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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1100

NORTHERN FREIGHT LINES, INC., ET AL.,
Appellants,

v.

UNITED STATES OF AMERICA, ET AL.,
Appellees.

On Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division

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JURISDICTIONAL STATEMENT

Appellants, Northern Freight Lines, Inc., Pike Transfer Co., Inc., Carolina Freight Carriers Corp., Consolidated Freightways Corporation of Delaware, Roadway Express, Inc., Southern Motor Carriers Rate Conference, Inc., Central and Southern Motor Freight Tariff Association, Inc., Middle Atlantic Conference, Rocky Mountain Motor Tariff Bureau, Niagara Frontier Tariff Bureau, Inc., Eastern Central Motor Carriers Association, Southwestern Motor Freight Bureau, National Motor Freight Traffic Association, American Trucking Associations, Inc., Regular Common Carrier Conference of American Trucking Associations, Inc., Carolina Delivery Service Co., Inc., Film Service, Inc., Indiana Transit Service, Inc., Iowa Film Delivery, and Theatres Service Company, appeal from the judgment of the United States District

Court for the Northern District of Georgia, Atlanta Division, entered on September 16, 1969, denying their action to suspend, annul, and set aside a report and order of the Interstate Commerce Commission, decided December 5, 1967, finding that the terminal area pickup, delivery, and transfer service by motor vehicle of express companies, and specifically those of Railway Express Agency, Inc., is exempt from all provisions of the Interstate Commerce Act within the Commission's jurisdiction, and is not subject to lawfully published terminal area regulations. Appellants submit this statement to demonstrate that the Supreme Court of the United States has jurisdiction of the appeal and that substantial questions are presented.

OPINION BELOW

The opinion of the District Court for the Northern District of Georgia, Atlanta Division, is reported at 304 F. Supp. 536 (adv. sheets), and a copy of the opinion appears as Appendix A hereto. A copy of the judgment of the District Court from which this appeal is taken appears as Appendix B hereto. A copy of the report and order of the Interstate Commerce Commission in *Express Company Terminal Areas*, 332 I.C.C. 91, is attached hereto as Appendix C.

JURISDICTION

This suit was brought under 28 U.S.C. § 1336 to enjoin and set aside the report and order of the Commission. (App. C) The judgment of the District Court for the Northern District of Georgia (Atlanta Division) was entered September 16, 1969, and notice of appeal was filed October 1, 1969. By orders of this Court dated November 28 and December 19, 1969, the time for docketing this appeal was extended to and including January 30, 1970. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by sections 1253 and 2101(b) of the Judicial Code, 28

U.S.C. §§ 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *American Trucking Associations, Inc.* v. *Atchison, T. & S. F. Ry.*, 387 U. S. 397 (1967); *United States* v. *Drum*, 368 U.S. 370 (1962); *Frozen Food Express, Inc.* v. *United States*, 351 U.S. 40 (1956).

STATUTES INVOLVED

The National Transportation Policy, 49 U.S.C., preceding §§ 1, 301, 901 and 1001, and sections 202(c), 203(a)(9) and (14), 206(a)(1), 207(a), and 208(a) of the Interstate Commerce Act, 49 U.S.C. §§ 302(c), 303(a)(9) and (14), 306(a)(1), 307(a), and 308(a), are reproduced in Appendix D hereto.

QUESTIONS PRESENTED

The questions presented by this appeal are:

1. Whether the District Court erred in sustaining a report and order of the Interstate Commerce Commission holding without regard of evidence to the contrary that Railway Express Agency, Inc., provides a distinctive service meriting different terminal area treatment than that received by ordinary motor carriers of freight?

2. Whether the District Court erred in sustaining a report and order of the Interstate Commerce Commission holding that Railway Express Agency, Inc., a wholly-owned railroad subsidiary, is free to extend terminal-area service incidental to line-haul motor vehicle movements, in the absence of "special circumstances" such as disclosed in *American Trucking Associations, Inc.* v. *United States*, 355 U.S. 141 (1957)?

3. Whether the District Court erred in refusing to vacate its judgment herein and in failing to remand this matter to the Interstate Commerce Commission for determination of the question of ownership and control of Railway Express Agency, Inc.?

STATEMENT OF THE CASE

On March 19, 1964, on its own motion, the Interstate Commerce Commission issued a notice of proposed rulemaking instituting an investigation into terminal area transfer, pickup, and delivery service by motor vehicle, in interstate or foreign commerce, by or for express companies under Part I or Part II of the Interstate Commerce Act (49 U.S.C. § 1 *et seq.*, and § 301 *et seq.*) The order listed certain specific issues, among others, to be considered, including whether previously promulgated terminal area regulations applicable to motor carriers of property subject to Part II of the Act (the so-called MC-37 terminal area limits, now published in 49 C.F.R. § 1049) govern the extent of terminal area motor services which an express company may or should provide on traffic moving to or from the terminal area point in motor carrier line-haul service subject to Part II of the Act. Railway Express Agency, Inc. (REA) and "any other express company or companies subject to Part I of the Act" were named respondents; however, REA was the sole respondent to appear. (App. C, p. 21a)

Eleven days of hearing were held before a Hearing Examiner whose report and recommended order were served by the Commission on August 25, 1965. The Examiner's findings and conclusions were summarized in the Commission's report (App. C, p. 23a):

> "The examiner found that REA's conduct of motor carrier operations beyond the limit of MC-37 terminal areas actually constitutes the performance of line-haul motor movements for which specific authority is required, and that to the extent such operations are conducted without specific authority, they are unlawful. He further found that while REA also utilizes rail service for line-haul movements, there is no reason to vary the geographical limits of

[1] Those terminal area limits also apply to freight forwarders operating under permits from the Commission.

a terminal area according to the mode of line-haul service utilized in moving traffic to and from the terminal, and that the maximum extent of the area in which express pickup and delivery services may be performed should be the same MC-37 terminal area for both line-haul rail and motor traffic."

Exceptions to the report and recommended order were filed by REA, appellants and others replied, and the Commission heard oral argument. By its report and order dated December 5, 1967 (App. C), the Commission reversed the findings and conclusions of the Hearing Examiner and found, *inter alia*, that the terminal area transfer, collection, and delivery service by motor vehicle of express companies, and specifically of REA, is exempt from all provisions of the Interstate Commerce Act within the Commission's jurisdiction, and that the terminal area regulations applicable to other motor carriers of property may not be uniformly applied to the express operations conducted by express companies, and particularly REA, in setting their terminal areas, "although such carriers remain subject at all times to the requirements of part II of the act and our rules and regulations thereunder in all other respects so far as their motor operations and particularly their line-haul motor movements are concerned." (App. C, pp. 54a-55a).

The District Court denied appellants' complaint, holding that the Commission had a rational basis upon which to conclude that REA offered distinctive service meriting different terminal area treatment than that received by ordinary motor carriers. (App. A, pp. 16a-17a) It, therefore, found it unnecessary to decide if REA is governed under Part I or Part II of the Interstate Commerce Act as to its line-haul movement by motor vehicle. (*Ibid.*)

After the issuance of the Commission report and order subject to review herein, information came to appellants' attention through various newspaper articles respecting an apparent change in ownership and control of appellee

Railway Express Agency, Inc., which appellants believe is relevant to the Commission determination in that report and order. On November 20, 1969, appellants filed a motion with the District Court under Rule 60(b) of the Federal Rules of Civil Procedure for vacation of the District Court's final judgment to permit the filing with the Interstate Commerce Commission of an appropriate petition for reopening and reconsideration of the report and order sustained by the District Court.

Upon application of appellants, by orders dated November 28 and December 19, 1969, this Court extended the time for docketing the appeal herein to and including January 30, 1970. (App. E and F)

By order dated January 8, 1970 (App. G), the District Court overruled and denied appellants' motion for vacation of judgment.

THE QUESTIONS ARE SUBSTANTIAL

1. This case represents but one of a number of recent and continuing controversies resulting from what the Court below characterized as REA's "transition from an express carrier to a regulated motor carrier of general commodities." (App. A, p. 9a) Issues arising out of "the increasing diversification of REA's transport activity"[2] have been and continue to be involved in numerous proceedings before the Commission, and have been before the courts on several recent occasions.[3]

The growing competition of REA with the regulated motor carriers of property and the freight forwarders resulting from that diversification of REA's transport

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[2] *Denver & R.G.W.R.Co.* v. *United States*, 387 U.S. 485, 503 (1967).

[3] *Saginaw Transfer Co.* v. *United States*, 275 F. Supp. 585 (E.D. Mich. 1967); *New England Motor Rate Bureau, Inc.* v. *United States*, 254 F. Supp. 663 (D. Mass. 1966), *aff'd mem.*, 385 U.S. 203; *Auclair Transportation, Inc.* v. *United States*, 221 F. Supp 328 (D. Mass. 1963), *aff'd mem.*, 376 U.S. 514; *Saginaw Transfer Co.* v. *United States*, Civil Action No. 2964 (E.D. Mich.) (pending on briefs and oral argument).

activity is a primary factor in the instant controversy. The dissents of Commissioners Murphy, Walrath and Bush to the Commission's action herein [4] all acknowledge the evolution of REA from an "express company" to a "motor common carrier of general freight," and the increased competitive advantage the decision below gives to REA. (App. C, pp. 65a, 66a, 69a-70a) Commissioner Murphy stated the effect of the majority decision (App. C., p. 65a):

> "Thus, contrary to the findings of the majority, the demonstrated threat herein is not that the public will be deprived of service, but that REA is exercising an unfair advantage over its competitors. In looking to the future, it must be recognized that REA is changing, if not already, into a nationwide motor carrier."

In the decision and judgment here on appeal, the District Court recognized that in recent years significant changes have occurred in REA's method of operation, resulting in increasing competition between REA and the independent motor carriers and a blurring of the distinction between REA's ambivalent "express" service and ordinary freight service. This change in operation and competition, which is recorded in the Commission decisions cited and quoted below, began in 1959 with the advent of new REA management. "REA has in recent years shown great interest in obtaining, and has actively solicited, large shipments of various commodities to produce what is termed a better 'mix' with the smaller shipments traditionally handled." [6] To attract these "larger

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[4] The report and order upheld by the Court below was joined by five of the eleven members of the Commission, while three members dissented and three did not participate. (App. C, pp. 55a, 66a, 67a, 70a)

[5] App. A, p. 14a, quoting from *Freight, All Kinds, L.C.L. Container Charges—U.S.A.*, 323 I.C.C. 468, 484 (1964).

[6] App. A, p. 3a, quoting from *Express Company Terminal Areas*, App. C herein, at p. 32a.

shipments of commodities traditionally handled by motor carriers, REA has filed aggregate, unit, and volume rates,"[7] and as a result of this activity, competition between REA and the ordinary freight carriers "has been waged more vigorously and on a wider front."[8]

In *Denver & R.G.W.R. Co.* v. *United States*, *supra*, this Court noted the concern of the trucking and freight forwarding interests over the increasing diversification of REA's transport activities. In that proceeding, REA not only conceded the increasing competition, but argued that "because of the increasing cross-competition among groups carrying transport, it is impossible to categorize REA as a carrier of 'express,' . . . ."[9]

The continuing concern of the motor carriers over competition from REA stems from the fact that, despite its consideration of the question in several cases, the Commission has failed to provide meaningful distinction between "express service" and "general freight service," and has failed to clearly define the nature of the "express service" which REA may perform. In the report upheld by the District Court below, the Commission refused to consider this question, stating (1) that it had discussed it "extensively" in numerous cases, (2) that it is both collateral to and beyond the scope of the proceeding, and (3) that there is no evidence that REA "is not functioning as an express company in accordance with the criteria enunciated" in previous cases. (App. C, pp. 34a-35a) Notwithstanding the foregoing, the Commission's

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[7] App. A, p. 9a.

[8] App. A, p. 14a, quoting from *Freight, All Kinds, L.C.L. Container Charges—U.S.A.*, *supra*, 323 I.C.C. 468, at 484.

[9] 387 U.S. 502-03. REA's brief to the Court in the *Denver and Rio Grande* case included an eight-page Appendix (pp. 76-83) designed to demonstrate that "it is no longer possible to draw a clear line of demarcation between 'express' and 'ordinary freight'" (Brief, p. 78), and that REA is in direct competition "in a large area" with motor carriers and freight forwarders. (Brief, pp. 81, 83)

ultimate conclusion to treat REA differently from the motor carriers and freight forwarders in the matter of terminal area regulation rested squarely on the assumption that REA performs "express service" which is unique, and different from motor carrier freight service. After declining to consider the question of the nature of REA express service and its relation to the ordinary freight service of motor carriers, the Commission said (App. C, p. 35a):

> "Accordingly, our ultimate conclusion here must be based upon, as well as limited to, the proposition that all of the traffic handled by REA is, in fact, moving in 'express service' as that term has been defined, particularly in view of the extensive consideration previously given this matter."

And the report is studded with references to the "unique" nature or "distinctive character" of that service.[10]

Appellant motor carriers are not the only ones who are unable to find in the Commission reports language which defines REA's rapidly changing transportation activities. In *Saginaw Transfer Co.* v. *United States*,[11] the District Court struck down a Commission order approving reduced REA rates on shipments of chemicals aggregated in 20,000- and 30,000-pound lots, because of the Court's inability to determine from the report and order whether the service covered by the tariff was, in fact, express service:[12]

> "The statement of facts, conclusions, and findings of the examiner, affirmed and adopted by the Com-

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[10] *E.g.*, App. C., pp. 36a, 38a, 42a.

[11] 275 F. Supp. 585 (E.D. Mich. 1967). On reconsideration after remand, the Commission affirmed its prior conclusion that the rates in question were just, reasonable, and otherwise lawful. (335 I.C.C. 20). A motion for leave to file a supplemental complaint was filed with the District Court on October 16, 1969, but was later withdrawn because the tariff in issue was cancelled, rendering the issues moot.

[12] 275 F. Supp. 585, 589.

> mission, do not provide this Court with a basis for determining whether the result reached comports with the statutory standards and the National Transportation Policy. While conceding that respondent's authority is limited to 'commodities moving in express service,' we can find no resolution of the issue thus presented. While recognizing the legal intricacies of the matter, we do not believe that they excuse the obscurity and involution of the ruling by the agency. If we were to speculate, we might consider the findings and conclusions to mean that the distinction between 'express' and 'regular' or 'ordinary' service has ceased to exist, or, if not, that there are no meaningful criteria left by which to test either. So far as we can tell, Congress has not become aware of this hypothetical development, and has made no provision for dealing with it."

In *New England Motor Rate Bureau, Inc.* v. *United States*, 254 F. Supp. 633, 637 (D. Mass. 1966), the Court, while declining to overturn the Commission's approval of REA's rates for container service which "may not represent the highest calibre of express service," nevertheless recognized that "a service might be so far diminished as to cease to be an express service entirely."

The District Court in the decision here on review also recognized that the continuing change in REA's transportation activity may result in the elimination of any distinction between express service and general freight service (App. A, p. 11a):

> "At some point in time, REA's activities may become indistinguishable from those of ordinary motor carriers, thus subjecting REA to identical economic regulation."

Although it recognized the continuing change in the nature of REA's transportation activity, the District Court below refused to hold that the Commission acted unlawfully in failing to consider the record evidence of sub-

stantial and growing competition between REA and the general freight motor carriers: [13]

> "The ICC did not act arbitrarily in recognizing that competition was not necessarily the crucial factor in defining the terminal areas for REA. Whatever the competition involved, the ICC correctly found that REA performed a distinctive service unmatched by other carriers. *Therefore, although REA may be increasingly engaging in competition with motor carriers, this does not mean that it has lost its 'express' characteristics, . . . at least at this time.*"

No one disputes that for several years REA has been engaged in a continuing change in its transportation activities and in a transition from an express carrier to a regular motor carrier of general commodities.[14] As plaintiffs-appellants' counsel conceded at the oral argument (App. A, p. 9a), and as the dissents to the Commission report and order show (App. C, pp. 65a, 66a, 69a), the central point of dispute here was the extent to which that transition has been completed.

The question was raised before the Commission whether a difference exists between "true express service" and "general freight service," and whether REA is currently providing both, and, particularly, the latter. (App. C, p. 34a) Although evidence was offered to show the changing pattern of REA's operations and its growing competition with the motor carriers, the Commission declined to consider such evidence, relying instead upon the holdings of *prior* decisions for the proposition that "all of the traffic handled by REA is, in fact, moving in 'ex-

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[13] App. A, p. 14a, citations omitted. Emphasis added.

[14] Although arguing to the Commission in this proceeding that the Hearing Examiner did not adequately consider "the unique character" of its service (App. C, p. 24a), at the same time, even REA was urging this Court to find that "because of the increasing cross-competition among groups carrying transport, it is impossible to categorize REA as a carrier of 'express,' . . . ." *Denver & R.G.W.R. Co.* v. *United States*, *supra*, 387 U.S. 458, 503 (1967).

press service' as that term has been defined. . . ." (App. C, p. 35a)

Evidence related to rates and to "REA's intensified solicitation of larger shipments," which the Commission rejected as being of a "limited and peripheral relation to the terminal area question" (App. C, pp. 41a-42a), is directly relevant to the determination of the current nature of REA's transport activity. It was error for the Commission to exclude from its consideration these facts and circumstances which should have been considered.[15] And it was error for the District Court to affirm a Commission decision reached in disregard of such facts and circumstances.

As acknowledged by Commissioner Murphy in his dissent (App. C, p. 65a), the Commission action herein allows REA to exercise an unfair advantage over its competitors. Under this decision, REA may extend the geographic scope of its operations in competition with other motor carriers merely by publishing, on one day's notice, a new terminal area description embracing a new traffic generating point. Other motor carriers—and freight forwarders as well—that wish to offer service beyond the MC-37 terminal area limits of authorized points of service must apply for new operating authority, which applications frequently may be determined only after protracted proceedings.

The District Court stated that appellants are protected by their right to petition the Commission to undertake an investigation and suspension proceeding as to any changes in REA's terminal areas they feel are unreasonable or to file a complaint with the Commission testing particular terminal areas. (App. A, p. 16a) The effectiveness of such remedies is greatly attenuated by the large number of terminal area changes published by

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[15] *Texas & P.R. Co. v. Interstate Commerce Commission*, 162 U.S. 197, 235 (1896)

REA [16] and the time required to determine such petitions and complaints,[17] particularly in view of REA's ability to enter upon the newly extended service on one day's notice and to continue the operation until the petition or complaint is determined.

This instantaneous ability of REA to institute new motor carrier service, essentially no different from that of the numerous competing general freight motor carriers, does not comport with the requirements of the National Transportation Policy. In its total emphasis on promotion, the Commission has disregarded equally important considerations in the National Transportation Policy.

The conclusion of the District Court below that the Commission decision "provides for *fair and impartial regulation of REA* by assuring uniform terminal areas regardless of the mode of line-haul movement employed," [18] is a patent distortion of the policy requirement to "provide for *fair and impartial regulation of all modes of transportation* subject to the provisions of this act. . . ."[19] Regulation materially benefiting one carrier to the substantial detriment of competing carriers and modes simply cannot be twisted to accommodate to a requirement of fair and impartial regulation of all modes. It is clear

[16] REA's traffic witness testified at the hearing that REA published 625 changes in terminal area limits in one year, the majority being extensions. (Hearing Exh. 79, p. 5; Hearing Tr., p. 542)

[17] In *Barton Truck Line, Inc.* v. *Railway Express Agency, Inc.*, 95 M.C.C. 625 (1964), just over one year elapsed between the filing of the complaint (July 22, 1963), and the issuance of the decision of the Commission, Division 1 (August 5, 1964), finding that REA's extension of its Salt Lake City, Utah, terminal area approximately 35 miles through "[a] wide expanse of undeveloped wasteland" to embrace the Tooele Ordnance (Army) Depot was unreasonable. (95 M.C.C. at 630)

[18] App. A, p. 15a. Emphasis supplied.

[19] 49 U.S.C., preceding §§ 1, 301, 901, and 1001. Emphasis supplied. The full text of the policy is set out in Appendix D hereto.

from the District Court's statement that it did not find that the Commission weighed the impact of its decision on the motor carriers and freight forwarders which is a minimum requirement of the policy provision.

It is also evident that the Commission decision fails to consider the effect of practically unrestrained extension of REA's motor carrier service upon "safe, adequate, economical, and efficient service" and upon "sound economic conditions in transportation and among the several carriers"—goals which the Commission is required in the National Transportation Policy to promote and foster. The District Court found it significant that the motor carriers evidenced little interest in adopting REA's system of defining terminal areas by "managerial discretion." (Appendix A, p. 17) However, if all carriers were permitted to expand and alter the geographic scope of their operations at will, there is serious question whether adequate, economical, and efficient service and sound economic conditions in transportation could long survive. In fact, such "managerial discretion" would spell the end of the scheme of regulation embodied in the Act and particularly in sections 206(a)(1), 207(a), and 208(a).[20] Part II of the Interstate Commerce Act reflect a legislative judgment that the transportation needs of the nation may best be met by allowing only such motor carrier operation in interstate and foreign commerce as the Commission finds to be required. Congress took away the unrestrained freedom of entry into this nationally vital service and empowered the Commission to issue certificates of public convenience and necessity which must specify the service to be rendered, including the routes, the fixed termini, and the territory to be served. The "managerial discretion" of any carrier or group of carriers to extend or alter its prescribed service at will is antithetical to this legislative purpose.

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[20] 49 U.S.C. §§ 306(a)(1), 307(a) and 308(a), reproduced in Appendix D hereto.

As Commissioner Murphy stated in his dissent, "The touchstone of the national transportation policy contains a large element of fairness as well as promotion." (App. C, p. 65a) The Commission in its report and order sustained by the Court below, disregarded this element of fairness by its refusal to weigh the competitive consequences of its action.

2. In its report and order sustained by the Court below, the Commission found it "significant" that REA "was organized and continues to be wholly owned by a number of railroads, [and] that it operates under an agreement to which most of the Nation's railroads are parties. . . ." (Appendix C, p. 28a) This statement of REA's ownership and control was adopted by the Court below, although it noted a reference in the brief of the United States to certain news stories indicating that the railroad owners of REA had agreed to sell their stock to "'unaffiliated persons." [21]

Subsequent news stories indicated that the alleged sale of the REA stock occurred on or about August 21, 1969, under terms which gave the railroad owners, among other considerations, warrants to buy stock in a new holding company that will operate REA's express business. Because these stories indicate a possible change in the ownership and control of REA and possible consequent change in its operations and status, appellants, on November 20, 1969, filed in the District Court a motion for vacation of judgment herein to permit the filing of a petition for reopening and reconsideration with the Interstate Commerce Commission. By order dated January 8, 1970 (App. G), the District Court overruled and denied that motion.

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[21] App. A, p. 2a, esp. n. 2. Neither the decision below nor the Government brief cited refer to any Commission finding that the alleged new owners of REA are "unaffiliated" with the present rail owners or any of them.

In the District Court, appellants argued that the Commission erred also in failing to give recognition to the fact of REA's rail ownership and the clear Congressional policy of opposition to railroad incursions into the field of motor carrier service,[22] a policy applicable to REA when it seeks authority for motor carrier operations wholly disassociated from rail service.[23] The District Court rejected this contention, saying (App. A, p. 16a):

> "However, the restrictions in REA's motor certificates, discussed above, protect against unwarranted intrusions. In addition, since REA's motor carrier service acts as a supplement to declining line-haul movement by rail, the extension of motor carrier service is related to the rail activities of REA's owners. See *Nashua*, *supra*, at 339-340."

The restrictions referred to are those which "recognize the express nature of REA's operations. . . ." (App. A, p. 16a) In the first part of this argument, we have shown the inadequate protection given by the "express" restrictions against the continuing expansion of REA's transportation activities. Furthermore, the "express" restrictions were not designed to prevent *railroad* incursions into the field of *motor carrier service*. By its action here, the Commission has freed REA to extend, at will, its terminal area operations incidental to its *line-haul movements by motor vehicle*. The District Court erred in concluding that such extension of service "is related to the *rail activities* of REA's owners." The correct view is that stated by the District Court for the Eastern District of Michigan:[24]

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[22] *American Trucking Assocs., Inc.* v. *United States*, 364 U.S. 1 (1960).

[23] *Railway Express Agency, Inc., Ext.—Nashua, N.H.*, 91 M.C.C. 311 (1962), aff'd. *sub nom., Auclair Transportation, Inc.* v. *United States*, 221 F. Supp. 328 (D. Mass., 1964), 376 U.S. 514.

[24] In *Saginaw Transfer Co.* v. *United States*, *supra*, 275 F. Supp. at 590. (Emphasis in original)

> "While railroads should be able to use service by motor vehicle to public advantage in *their operations*, if the motor transportation is essentially unrelated to rail service, the railroad parents are invading the field of trucking; and under normal circumstances, the National Transportation Policy is thereby offended."

As the extension of terminal area operations incidental to REA's *line-haul motor movements* is not related to the *rail service* of its railroad owners, the decision herein conflicts with the requirements of that transportation policy.

As noted above, both the Commission and the Court below based their conclusions, in part, upon REA's ownership and control by the Nation's railroads. In the light of the apparent change in that ownership and control subsequent to the making of the Commission report and order herein, and while the District Court was considering this matter, as a minimum this proceeding should be remanded to the District Court below for further remand to the Commission with direction to reconsider its report and order specifically with respect to the following two questions:

(1) Has there been a change in the ownership and control of REA and in its operations and status as a result thereof; and

(2) If so, does such change in ownership, control, status, and operation require any change in the report and order herein, made December 5, 1967?

CONCLUSION

The questions presented by this appeal are substantial and of public importance. For the reasons stated, appellants urge the Court to note probable jurisdiction and to reverse the judgment of the District Court with remand to that Court for disposition consistent with the Court's opinion.

Respectfully submitted,

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APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 12699

NORTHERN FREIGHT LINES, INC., et al.,
Plaintiffs,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants,

and

RAILWAY EXPRESS AGENCY, INC.,
Intervenor-Defendant,

and

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., et al.,
Intervenors.

Before: BELL, Circuit Judge, EDENFIELD and HOOPER, District Judges.

EDENFIELD, District Judge:

The issue before this three-judge district court, constituted under 28 U.S.C. §§ 1336, 2284, 2321-2325, is whether the Interstate Commerce Commission acted within its discretion in concluding that Railway Express Agency should remain outside the terminal area [1] limits

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[1] The "terminal area" is the territory within which bona fide transfer, collection, and delivery services, as distinguished from line-haul or intercity service, may be performed. Palisano Common Carrier Application, 41 M.C.C. 229, 232.

for motor carriers, set under Part II of the Interstate Commerce Act.

A brief chronology will help establish the posture in which we find this action. Railroads have long been charged by the courts with the duty of making their railroad facilities available to the public, although not to every express agency, for the transportation of express matter. Express Cases, 117 U.S. 1, 24, 28 (1886). Along with passage of the 1887 Act to Regulate Commerce the ICC recognized that the railroads had a primary duty to furnish express service. To relieve themselves of this duty the railroads often contracted out for their small parcel, express traffic to independent express companies. These independent companies were brought within ICC jurisdiction in 1906, when the definition of common carrier in § 1(3)(a) of the Interstate Commerce Act was amended to include express firms. In 1929, the nation's railroads established Railway Express Agency as their exclusive agent to conduct express service. They continue to this day to be its owners.[2] REA operated motor vehicle collection and delivery operations as part of its terminal area service and generally relied upon passenger trains for the line-haul movement of its express commodities. Improved highways and a severe attrition in railroad passenger service in recent years has led to greater reliance on motor vehicles, often its own, for the line-haul movement of express shipments. In order to engage in line-haul shipments with its own trucks, REA must obtain motor carrier certificates under Part II of the Interstate Commerce Act. But, while "[g]reater reliance on motor vehicles for line-haul movements has reduced the amount of express traffic moving by rail, . . . this continues to be the principal mode used." Express Company

[2] The United States, in its brief, at 5, n.2, notes that the railroads have agreed to sell their stock interest to unaffiliated persons, citing the Wall Street Journal, July 9, 1969, at 8, col. 1-2, July 10, 1969, at 3, col. 5-6.

Terminal Areas, 332 I.C.C. 91, 100 (Ex Parte No. 242, 1967).

Along with increased reliance on motor vehicles for line-haul movement, other significant changes have occurred in REA's modus operandi. "REA has in recent years shown great interest in obtaining, and has actively solicited, large shipments of various commodities to produce what is termed a better 'mix' with the smaller shipments traditionally handled." *Express Company Terminal Areas*, supra, at 100-101. These large volume shipments have often thrown REA into competition with independent motor carriers and freight forwarders. REA also instituted a "key-point terminal" program designed to reduce the number of smaller offices through consolidation into large and more efficient terminals. These consolidated terminals, capable of processing large volumes of traffic, have been situated, for purposes of efficiency, in locations central to their service areas, rather than tied to specific base municipalities. REA's consolidation program has produced a "concomitant enlargement of the terminal areas served by existing offices", *Ibid*, at 99, thus increasing the size of the area within which REA performs its pickup and delivery services.

The increasing size of REA's terminal areas has aggravated, from the plaintiffs' viewpoint, the distinction long recognized between express terminal areas and terminal areas for motor carriers. Due to the acknowledged differences between pure express service, governed under Part I of the Interstate Commerce Act, and regular motor carrier service, regulated under Part II of the Act, REA has been permitted to employ an entirely different system for defining its terminal areas than that used by motor carriers. There is no specific statutory provision conferring terminal areas upon line-haul motor carriers under Part II. Rather, the authority of motor carriers to provide pickup and delivery service in a defined terminal area is given incidental to their line-haul author-

ity. Motor carrier terminal areas for transfer, pickup and delivery, are determined by *Commercial Zones and Terminal Areas* (Ex Parte No. MC-37), 54 M.C.C. 21 (hereinafter cited as MC-37). REA terminal areas have not, in the past, been governed by MC-37 limits, which are generally tied to specific commercial zones and base municipalities. Although REA must often secure motor carrier certificates under Part II, for line-haul movement of express shipments, just as regular motor freight carriers, it has not felt itself bound by the more restrictive terminal areas of MC-37. REA claims exemption from motor carrier terminal area limits, even as to its line-haul motor carrier operations, because of its status as an express service under Part I. Thus, the ICC has allowed REA to set its own terminal areas merely by publication of its regular tariffs, ICCA-3 and ICCA-4. On one day's notice, REA is permitted to change and expand its terminal areas, solely at the discretion of its management. Motor carriers under Part II must undergo more complex and restrictive procedures to alter their terminal areas. REA terminal areas are, however, subject to regulation by the ICC through investigation and suspension procedures, and by complaints before it under section 13 of the Act, 49 U.S.C. § 13(1).

The result of REA's consolidation program and its considerable discretion in setting pickup and delivery areas has been the extension of REA terminal areas beyond the MC-37 commercial zones at some 750 REA offices[3] servicing 2771 points with a population of some 16 million people. Approximately one-half of these offices confine their terminal area services to areas extending less than ten miles beyond the MC-37 zones, "but some of the remainder serve points as far away as 50 miles. More spe-

[3] REA had 8320 offices, of which 3200 provided pickup and delivery service, at the time of the ICC ruling in late 1967. These figures, as well as the 750 points mentioned above which exceed MC-37 zones, may have changed somewhat since the ICC ruling.

cifically, 180 offices provide service to points ten to 20 miles distant from the MC-37 terminal area, 73 to points within 30 miles thereof, and the remaining 23 to points between 30 and 50 miles away." *Express Company Terminal Areas*, supra, at 100.

The ICC discussed the significant problems raised by REA's terminal areas and growing motor vehicle operations, in *Railway Express Agency, Inc., Extension—Nashua, N.H.*, 91 M.C.C. 311 (1962) (hereinafter cited as *Nashua*), a case in which REA sought several applications to operate as a common carrier by motor vehicle of general commodities moving in express service. The ICC tentatively decided that express business was subject to regulation under Part II of the Act, and stated that cases such as *American Highway Freight Ass'n., Inc.* v. *Railway Express Agency, Inc.*, 201 I.C.C. 755, and *Railway Express Agency, Inc. Determination of Status*, 21 M.C.C. 161, 187-189, demonstrated that express companies were subject to Part I regulation—and thus to different economic regulation than motor carriers—only as to those express services associated with line-haul movements by rail. Terminal areas had to be defined as for other motor carriers under Part II, when the line-haul movement was by motor vehicle. As the ICC put it:

> "In other words, when REA uses the services of a certified independent motor carrier, or even when it operates over its own certified highway routes, it is bound by all limitations inherent in such operating authority, including any which limit the performance of pickup and delivery service to a specifically defined motor carrier terminal area." *Nashua*, supra, at 338.

While the *Nashua* conclusion was often reiterated, *Railway Express Agency, Inc., Extension—Clinton*, 92 M.C.C. 487; *Railway Express Agency, Inc., Extension—Auburn, Mass.*, 92 M.C.C. 657, 658-9; *Railway Express Agency, Inc., Extension—Bangor, Maine*, 98 M.C.C. 75, 78, the

ICC was clearly disturbed by the differences in terminal areas which would result solely from the mode of line-haul movement employed. This anxiety led the ICC to conclude that a rule-making procedure was necessary for purposes of uniformity:

> "We do think, however, that with the fact of REA's decreasing utilization of passenger trains, and its increasing reliance on line-haul motor transportation, this state of the law [different terminal area regulation depending on the mode of line-haul movement for express shipments] is apt to foster unnecessary legal complications in what should be a relatively simple carrier-shipper relationship. Unless the effect and applicability of various provisions of the law are coordinated, it would seem that the maximum pickup and delivery zones at a given community incident to a line-haul shipment by a common carrier by express, such as REA, would vary depending upon whether the transportation has been by means of rail or motor vehicle. *We do not view this as a tolerable situation, and we will take the necessary steps to remove this probable uncertainty.* At this time, we conclude that it would be in the public interest to institute a specific proceeding with the purpose of defining the terminal area of an express company as that type of carrier is regulated by the Interstate Commerce Act as a whole." *Nashua*, supra, at 338. (Emphasis added.)

In light of *Nashua*, the ICC on its own motion[4] in-

[4] By its order served April 13, 1964, the ICC stated that its rule-making proceedings would inquire into "the legal and operational practices, and the manner and methods of operation associated with transportation by motor vehicle, in interstate or foreign commerce, in the performance of transfer, collection, delivery, and all similar and related types of services and practices, within what are described or otherwise known as terminal, pickup, or delivery areas of, or for, express companies under Part I or Part II of the Act, with a view to prescribing such rules and regulations as may be appropriate, or taking such other action as may be necessary or desirable in the light of the national transportation policy and the

stituted a rule-making proceeding under 49 U.S.C. §§ 1, 12(1), 302(c)(2), 303(a)(14), 304, and section 4 of the Administrative Procedure Act, 5 U.S.C. § 553, at which hearings were held. The Hearing Examiner concluded that REA's common carrier operations by motor vehicle subjected REA to MC-37 zones under Part II. To avoid distinct treatment for REA's line-haul rail movements, the Examiner concluded that MC-37 terminal area limits should apply to REA regardless of its mode of line-haul movement—whether by rail or motor vehicle. He based this holding, among other things, on the finding that REA's conduct of motor carrier operations beyond MC-37 commercial zones constituted the performance of line-haul, rather than express, movement, and on the conclusion that REA was establishing its terminal areas for assembly and distribution purposes, rather than for bona fide collection and delivery service.

The ICC, with three dissents and three not participating, reversed the Examiner's recommended decision and concluded that REA, because of its unique express service, should remain subject to the same terminal area limits it had before, rather than be regulated by the MC-37 limits set for motor carriers. The ICC thus maintained the status quo. The ICC concluded that regardless of whether REA's express terminal area operations in conjunction with line-haul motor movements fell within Part I or Part II of the Act, REA should remain outside the MC-37 limits. As the ICC explained:

> "Having found express service to constitute a distinct mode of transportation separate from the underlying modes it may utilize . . . we conclude that we possess sufficient authority under the act to allow the setting of express terminal areas which may dif-

purposes of the Interstate Commerce Act as a whole, to resolve and define the operational practices, scope, and legal principles which do or should obtain in the performance of the terminal area services and related activities described."

fer from those of motor carriers and freight forwarders. . . .

"We are content, therefore, to rest our conclusions here on the legitimate exercise of the statutory authority vested in us by the act in the light of the national transportation policy. Our conclusions would not differ whether or not respondents' express terminal area motor operations in connection with line-haul motor movements fall within the affirmative definition of a common carrier by motor vehicle in section 230(a)(14) of the act rather than within the exception thereto, so as to make them subject to regulation under part II rather than under part I of the act." *Express Company Terminal Areas*, supra, at 110-111.

In this action, we have a limited scope of review of the ICC's rule-making decision.[2] The specific statutes under which the ICC's rule-making was undertaken, 49 U.S.C. §§ 1, 12(1), 302(c)(2), 303(a)(14), 304, do not require that the rules promulgated "'be made on the record after opportunity for an agency hearing", 5 U.S.C. § 553(c). Therefore, §§ 556, 557 do not come into force and the scope of review for adjudicatory proceedings under 5 U.S.C. § 706(2)(E) is inapplicable. *Bridgeport Federal Savings & Loan Ass'n.* v. *Federal Home Loan Bank Board*, 199 F.Supp. 410 (E.D.Pa.1961), *aff'd.*, 307 F.2d 580 (3d Cir. 1962), *cert. denied*, 371 U.S. 950; *George A. Rheman Co.* v. *United States*, 133 F.Supp. 668 (E.D. S.C. 1955). The fact that an oral hearing was held does not change the rule-making procedure into an adjudicatory one, for purposes of judicial review. *American Trucking Ass'n.* v. *United States*, 344 U.S. 298 (1953).

[2] The ICC's procedures were instituted pursuant to the rule-making provision of the Administrative Procedure Act, 5 U.S.C. § 553, its order commencing proceedings was styled as a rule-making exercise, and the purpose of the undertaking, *see* note 4, supra, is within the commonly accepted meaning of rule-making. *See, e.g.*, Willapoint Oysters, Inc. v. Ewing, 174 F.2d 676 (9th Cir. 1949), *cert. denied*, 338 U.S. 860.

Unless we find the ICC acted in an arbitrary and capricious manner, in abuse of its discretion or otherwise out of accordance with the law, the ICC's rule-making decision must be supported. *Tidewater Express Lines, Inc.* v. *United States*, 381 F.Supp. 995 (D.Md. 1968). Thus, the ICC must be upheld if there is a rational basis for its judgment. While this standard of review does not give the ICC carte blanche, *Saginaw Transfer Co.* v. *United States*, 275 F.Supp. 585 (E.D.Mich. 1967), it recognizes the ICC's expertise in a rule-making proceeding involving complex issues of transportation policy. *United States* v. *Detroit Navigation Co.*, 326 U.S. 236, 241 (1945).

With this standard of review in mind, we affirm the decision of the ICC. First, at the oral hearing, plaintiffs' counsel conceded that the central point of dispute was the extent to which REA had completed a transition from an express carrier to a regular motor carrier of general commodities. In questions of degree, the judgment of the ICC should be respected. Second, there can be no doubt that REA service and ordinary freight service have become somewhat more alike in recent years. Indeed, "the distinction between the two types of services has been blurred to some extent." *Freight, All Kinds, L.C.L. Container Charges—U.S.A.*, 323 I.C.C. 468, 483. To attract the large shipments of commodities traditionally carried by motor carriers, REA has filed aggregate, unit, and volume rates, its revenue per shipment has risen from $5 to $6 over a ten-year period, and the average weight of its shipments since 1959 has increased from 45 to 51 pounds. A number of motor carriers have a genuine interest in handling less-than-truckload freight which REA has specialized in over the years. "[I]n some instances a significant percentage of a particular carrier's gross revenue is attributable to such traffic." *Express Company Terminal Areas*, supra, at 102. Yet, despite the similarities, it was not arbitrary for the ICC to find that REA

offered a distinctive service, unmatched by common carriers, entitling it to different terminal area treatment.

Traditionally, express service has been recognized for its special, expedited handling and transportation of comparatively small shipments at premium rates, with store-door delivery and single-line responsibility. *Nashua*, supra, at 322; *Freight, All Kinds, L.C.L. Container Charges —U.S.A.*, supra, at 489 (concurrence). REA's activities meet the criteria of an express service established in the leading case of *Transportation Activities of Arrowhead Freight Lines*, 63 M.C.C. 573, 581-582; *see, also, Freight, All Kinds, L.C.L. Container Charges—U.S.A.*, supra, 479-480; *Express Company Terminal Areas*, supra, at 103. REA, unlike motor carriers of general commodities, holds itself out to transport all commodities in any form tendered, including items, "such as foodstuffs, seafood, fresh meats, drugs and medicines, film, legal papers, jewelry and other valuables, live animals, baby chicks, radioactive material, corpses, live blood, eggs, explosives, commodities which are injurious or contaminating to other lading, and commodities requiring special care and protection." *Nashua*, supra, at 315. Moreover, REA "provides armed guard and surveillance services when required," *Ibid.* Plaintiffs make no contention that they carry, as a general practice, such a wide-ranging group of materials. REA service is also distinctive for its emphasis on small parcel traffic. While, as we have shown, REA also seeks large shipments and motor carriers are increasingly relying upon less-than-carload shipments, there still appears to be a significant difference in emphasis given by the respective services to small shipments. The average weight per shipment for REA—51 pounds—is much less than the comparable weight for motor carriers—who, in addition, often impose minimum weight requirements. *Express Company Terminal Areas*, supra, at 102. REA's expeditious handling, single-line carriage, and premium rates have not been seriously challenged.

The ICC could reasonably find that REA did not lose its characteristics as an express carrier merely because it actively seeks large-package shipments. *Freight, All Kinds, L.C.L. Container Charges—U.S.A.*, supra, at 480, or otherwise performs certain functions traditionally undertaken by motor carriers. *Cf. American Trucking Ass'ns., Inc.* v. *Atchison, Topeka & Santa Fe Ry.*, 387 U.S. 397 (1967). At some point in time, REA's activities may become indistinguishable from those of ordinary motor carriers, thus subjecting REA to identical economic regulation. But the ICC could rationally conclude that this point has not yet been reached.

Third, "[e]xpress service is a relative concept that has its roots in the circumstantial need by the shipping public for a special transportation service." *Nashua*, supra, at 324. REA continues to meet the special needs of shippers to an extent not matched on a regular basis by other motor carriers. By recognizing the unique service REA continues to make available the ICC has protected the shipping public. The record is replete with evidence of shipper dependence on REA service. This public dependence is based on many factors: REA's delivery service (Exhibit 12, at 2; Exhibit 15, at 3); its single carrier nationwide coverage (*see, e.g.*, Exhibit 13, at 4); the simplicity of its rate structure for small shipments (*see, e.g.*, Exhibit 19, at 7); its ability to handle items, often at no extra charge, which necessitate peculiar protective services (*see, e.g.*, the case of Pepto Bismol, Exhibit 13, at 4); its expedited handling of small shipments of the minimum charge category, a service "not readily available elsewhere" (Exhibit 16, at 3); its flexibility in modifying terminal areas to meet industrial relocation in suburban and outlying areas outside MC-37 zones and beyond previously established express areas (Exhibit 21, at 4); its dependable willingness to take items of high value, danger, or perishability (Exhibit 13, at 4; Exhibit 11, at 3; Exhibit 49 at 3). Plaintiffs have adduced

no evidence that they are willing and able on a regular basis to provide comparable service. While motor carriers are seeking out less-than-carload shipments, their high minimum charges, their inability to supply single-line service, and their failure to regularly provide protective services preclude a finding, contrary to that made by the ICC, that REA's express service is non-distinctive and nonessential to the public. (*See*, Exhibit 12, at 5; Exhibit 13, at 4, 7-8; Exhibit 16, at 3; Exhibit 19, at 8; Exhibit 20, at 1-3.) Moreover, the ICC could properly consider the potential impairment to shippers if areas outside MC-37 zones, now served by REA, were precluded from such service. *American Trucking Ass'ns.* v. *United States*, 326 U.S. 77, 86 (1945). For example, the Department of Defense, a significant user of express service, maintains some "200 of the military installations under consideration in this proceeding which presently receive express pickup and delivery service . . . beyond presently denominated MC-37 terminal areas." *Express Company Terminal Areas*, supra, at 101. Many of the shippers which have intervened in these proceedings, and doubtless other shippers as well, either ship or receive significant volumes of commodities "destined for delivery beyond the present MC-37 terminal areas." *Ibid*, MC-37. (*See, e.g.*, Exhibit 12, at 3; Exhibit 13, at 9; Exhibit 15, at 3; Exhibit 16, at 4; Exhibit 19, at 4.) We do not say that subjection of REA to MC-37 zones would create a void in service which could never be filled. However, we do think that the ICC could recognize the potential unsettling effect of a restriction in REA terminal areas on those currently served by REA, based on its expert knowledge of transportation patterns in the United States, and the strong statements of the intervening shippers.

Fourth, plaintiffs do not seem to question that REA could properly operate outside MC-37 zones if the underlying mode of its line-haul movement was by rail—as much of it still is. We can conceive of no reason for different treatment simply because the curtailment of rail

passenger service has led REA to greater dependence on motor vehicles. *Auclair Transportation, Inc.* v. *United States*, 221 F.Supp. 328 (D.Mass. 1963), *aff'd. per curiam*, 376 U.S. 514 (1964). No segment of the shipping public should be deprived of REA's express services, simply because of a changing mode of interline movement. This partial dependence on motor carriers does not convert REA ipso facto into a nationwide freight operator, subject to all the regulations of ordinary motor vehicles. *Ibid; cf. Estes Express Lines* v. *United States*, 292 F. Supp. 842 (E.D.Va. 1968). The ICC did not act arbitrarily in treating REA's motor operations, in effect, as an integral part of its express service.

Had the ICC accepted the plaintiffs' argument that REA terminal area services should be restricted when the line-haul movement for its express services was conducted by its own motor vehicles, it would have been faced with the very situation from which it pulled back in *Nashua*, supra: different pickup and delivery zones at a given community for express shipments depending upon the mode of line-haul movement to be used. 91 M.C.C. at 338. It is reasonable to expect that this would cause administrative havoc at REA, since shipments would have to be treated differently due to the mode of intercity transportation subsequently employed. Expedited handling might suffer if REA terminal areas were curtailed, due to the need to shift to non-REA transportation during some part of the journey, while also undercutting the single-line responsibility which has helped make REA express service attractive. The shipper is the person protected by the ICC ruling and by this court today, for he cares little about the mode of intercity employed; he is concerned only with the express service REA furnishes. *See, Express Company Terminal Areas*, supra, at 107. "The choice is the shipper's; if he chooses to have his property move in an expedited fashion he is, in fact, using an express service. It is clearly in the public interest

that, if at all possible, this choice not be precluded." *Nashua*, supra, at 340:

Fifth, we cannot accept plaintiffs' argument that the ICC acted in an arbitrary fashion by failing to consider evidence of competition between REA and general freight motor carriers. Plaintiffs state that since the ICC bottomed their rule-making decision on the distinctiveness of REA's express service, it was error to fail to consider the competition which goes to the heart of the issue of uniqueness. The ICC recognized that "some motor carriers and freight forwarders may be affected by competition from REA generally, and particularly when this carrier may make a reasonable extension of one of its terminal areas." *Ibid*, at 108. Indeed, express service has long been in competition, to some extent, with motor carriers. As the ICC has stated, "[e]xpress service and ordinary freight service, of course, have never been wholly non-competitive. With changed conditions and the advent of REA's new management in 1959, competition between the services has been waged more vigorously and on a wider front. Nevertheless, that competition has been peripheral." *Freight, All Kinds, L.C.L. Container Charges—U.S.A.*, 323 I.C.C. 468, 484. The ICC did not act arbitrarily in recognizing that competition was not necessarily the crucial factor in defining the terminal areas for REA. Whatever the competition involved, the ICC correctly found that REA performed a distinctive service unmatched by other carriers. Therefore, although REA may be increasingly engaging in competition with motor carriers, this does not mean that it has lost its "express" characteristics, *cf. American Trucking Ass'ns. v. Atchison, Topeka & Santa Fe Ry.*, supra, *American Trucking Ass'ns.* v. *United States*, 260 F.Supp. 386 (D.D.C. 1966), *aff'd per curiam*, 387 U.S. 93; *Freight, All Kinds, L.C.L. Container Charges—U.S.A.*, supra, at 483, at least at this time.

Last, we find that the ICC's decision does no injustice to the National Transportation Policy, which has as its basic tenets:

> ". . . [T]o provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act . . . so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices . . . all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the Commerce of the United States." 49 U.S.C. preceding § 1.

The ICC decision provides for fair and impartial regulation of REA by assuring uniform terminal areas regardless of the mode of line-haul movement employed. The shipping public, dependent on REA for the expeditious handling of small, often special, parcels, is protected by the ICC's ruling, as we have noted. Certainly, the National Transportation Policy is preserved by protection of the public. Moreover, the ICC, in effect, recognized the "inherent advantages" of express service by treating its terminal area limits in a different fashion from those under which motor carriers are bound. Also it is significant that the motor carriers evidence little interest in adopting REA's system of defining terminal areas by managerial discretion. "The motor carrier intervenors . . . have indicated their general satisfaction with MC-37 zones, because, *inter alia*, they know the geographical scope of their own and their competitors' service area." *Express Company Terminal Areas*, supra, at 108. They do not seek to expand their terminal area limits but to

reduce REA's zones. As the record shows, this might severely handicap the distinctive express nature of REA's service.

Plaintiffs are not left unprotected by the ICC's ruling, nor are they put at an unfair advantage. They may petition the ICC to undertake investigation and suspension proceedings as to any changes in REA's terminal areas they feel unreasonable, and, as interested parties, may file a complaint with the ICC, testing particular terminal areas. *American Trucking Ass'ns.* v. *United States*, *supra*, at 390. Moreover, motor carriers are buffered by the special restrictions imposed in REA motor carrier certificates, received under Part II of the Act. These restrictions recognize the express nature of REA's operations, by limiting its motor authority to service auxiliary to or supplemental of its express service, by requiring that shipments transported be limited to those moving on through bills of lading or express receipts, and by imposing other unique restrictions. *Nashua*, supra, at 329.

Plaintiffs contend that the National Transportation Policy, as well as § 5(2)(b) of the Act have been violated by the intrusion of the railroad owners of REA into a field of motor carrier service unrelated to their rail activities. However, the restrictions in REA's motor certificates, discussed above, protect against unwarranted intrusions. In addition, since REA's motor carrier service acts as a supplement to declining line-haul movement by rail, the extension of motor carrier service is related to the rail activities of REA's owners. *See Nashua*, supra, at 339-340.

Therefore, the National Transportation Policy, which the ICC used as its "lodestar" in this proceeding, *Express Company Terminal Areas*, supra, at 104, has not been breached.

For the reasons stated above, we DENY plaintiffs' action to suspend, annul and set aside the order of the

ICC, and hold that the ICC had a rational basis upon which to conclude that REA offered distinctive service meriting different terminal area treatment, than that received by ordinary motor carriers. Because of this conclusion, we find it unnecessary to decide if REA is governed under Part I or Part II of the Interstate Commerce Act as to its line-haul movement by motor vehicle. In either event, REA's distinctive service is sufficient to warrant different terminal area treatment.

This 8th day of September, 1969.

/s/ Griffin B. Bell
GRIFFIN B. BELL
United States Circuit Judge

/s/ Newell Edenfield
NEWELL EDENFIELD
United States District Judge

/s/ Frank A. Hooper
FRANK A. HOOPER
United States Senior District Judge

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 12,699

NORTHERN FREIGHT LINES, INC., et al.,
Plaintiffs,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION,
Defendants,

and

RAILWAY EXPRESS AGENCY, INC.,
Intervenor-Defendant,

and

THE NATIONAL SMALL SHIPMENTS TRAFFIC CONFERENCE, INC., et al.,
Intervenors.

JUDGMENT

Pursuant to Rule 58 of the Federal Rules of Civil Procedure, IT IS ORDERED that the decision of the three-judge District Court entered September 9, 1969, be, and the same hereby is, made the judgment of the Court.

This 16th day of September, 1969.

CLAUDE L. GOZA
Clerk, U. S. District Court
Northern District of Georgia

/s/ By John H. Woodyard
Deputy Clerk

Approved:

/s/ Newell Edenfield
United States District Judge

APPENDIX C

Served December 28, 1967

INTERSTATE COMMERCE COMMISSION

EX PARTE NO. 242

EXPRESS COMPANY TERMINAL AREAS

Decided December 5, 1967

Upon investigation, found that the terminal areas within which express companies may offer free pickup and delivery service by motor vehicle on express shipments as an incident to their line-haul service, and in which such service is exempt from all provisions of the act within our jurisdiction; are not subject to the determinations made with regard to the scope of terminal areas of motor carriers and freight forwarders in the sixth supplemental report in Ex Parte No. MC-37, *Commercial Zones and Terminal Areas*, 54 M.C.C. 21, but are subject to review by the Commission on its own motion or as a result of action by other persons as to their reasonableness in particular cases.

William J. Taylor and *Jay D. Harris* for Railway Express Agency, Inc., respondent.

Arthur A. Arsham, M.W. Wells, Charles A. Washer, John E. Donelan, John M. Cleary, Leonard Mongeon, William J. Augello, Jr., Edwin F. Stadelman, and *John J. C. Martin* for interveners in support of respondent.

Richard R. Sigmon, William R. Rubbert, Peter T. Beardsley, Frank D. Hall, Reagan Sayers, John S. Fessenden, G. H. Dilla, Harry C. Ames, David A. Sutherland, Donald E. Cross, F. G. Freund, Andrew N. Happer, E. Myron Ball, Jr., Joseph P. Tuohy, S.S. Eisen, Paul D.

Borghesani, R. Edwin Brady, Albert B. Rosenbaum, David Axelrod, Gene Liipfert, Bryce Rea, Jr., John F. Hollengreen, Francis W. McInerny, S. Harrison Kahn, William O. Turney, Richard J. Bailey, and *J. D. Lawson* for other interveners.

John E. Faulk and *R. M. Hartsock* for the Department of Defense.

Carl P. Hoffman, Jr., for the Department of the Interior.

Asa J. Merrill, David H. Dantzler, and *John H. Fallon* for Interstate Commerce Commission, Bureau of Enforcement.

REPORT OF THE COMMISSION ON ORAL ARGUMENT

DEASON, *Commissioner:*

Exceptions to the report and recommended order of the examiner were filed by respondent Railway Express Agency, Inc. (REA), and the shipper interveners supporting it, to which intervening motor carriers and freight forwarders replied; and the issues were argued orally. Our conclusions differ from those recommended by the examiner.

This proceeding was instituted on our own motion under appropriate authority[1] for the general purpose of inquiring into the legal and operational practices, and the manner and methods of operation of express companies which are associated with transportation by motor vehicle, in interstate or foreign commerce, in the performance of transfer, collection, delivery, and all similar and related types of services and practices, within what are described or otherwise known as terminal, pickup, or delivery areas of, or for, express companies under part I

[1] Part I (49 U.S.C. 1, *et seq.*) and part II (49 U.S.C. 301, *et seq.*) of the Interstate Commerce Act, including sections 1, 12(c)(2), 203(a)(14), and 204 thereof (49 U.S.C. 1, 12(1), 302(c)(2), 303(a)(14), and 304); and section 4 of the Administrative Procedure Act (5 U.S.C. 1003).

or part II of the act. This inquiry was undertaken with a view to prescribing such rules and regulations as may be appropriate, or the taking of such other action as may be necessary or desirable in the light of the national transportation policy and the purposes of the Interstate Commerce Act in order to resolve and define the operations, practices, scope, and legal principles which do or should obtain in the performance of terminal area services and related activities. As we indicated in the order instituting the proceeding, there has been a growing concern over these problems in recent years; and the general issue was alluded to with some specificity in *Railway Exp. Agency, Inc., Extension—Nashua, N.H.*, 91 M.C.C. 311,[2] where we concluded that it would be in the public interest to institute a proceeding to resolve the legal and operational problems arising in connection with these terminal services.

REA was the sole respondent to appear, and the Bureau of Enforcement (formerly Bureau of Inquiry and Compliance), Interstate Commerce Commission, was directed to intervene. A number of shipper organizations and individual shippers also intervened,[3] primarily to

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[2] Affirmed *per curiam*, *Auclair Transp., Inc.* v. *United States*, 221 F. Supp. 328, 376 U.S. 514.

[3] National Industrial Traffic League, National Retail Merchants Association, Drug and Toilet Preparation Traffic Conference, American Retail Federation, Southern Seafood Company, of Baltimore, Md., The Norton Company (Behr-Manning Division), of Worcester, Mass., Norwich Pharmacal Co., of New York, N. Y., Sterling Drug, Inc., of New York City, Harvey's Groves, of Rockledge, Fla., International Latex Corporation, of Dover, Del. J. C. Penney Company, Inc., of New York City, American Home Products Corporation, of New York City, Coats & Clark, Inc., of New York City, Davis Brothers Florists, Inc., of Denver, Colo., and Macklanburg-Duncan Co., of Oklahoma City, Okla. Certain of the witnesses representing the individual shippers named above also purport to represent additional shipper organizations of which their firms are members, such as National Fisheries Institute, Eastern Industrial Traffic League, National Small Shipments Traffic Conference, and the Thread Institute, which is a member of the Eastern Industrial Traffic League. For the most part, however, their testimony relates

support REA's position on the aforementioned issues; and representatives of substantial segments of the regulated motor carrier [4] and freight forwarder industries [5] intervened in opposition thereto.

Issues Presented

The ultimate issue presented may be simply and readily stated. Should the geographical boundaries of the express terminal area (where free pickup, delivery and transfer service may be provided) for a particular point served by REA with motor vehicles in its express service be limited in scope to that terminal area prescribed for motor carriers and freight forwarders serving the same point? The size of the terminal areas for motor carriers and freight forwarders is determined under the criteria set forth in the sixth supplemental report in Ex Parte

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primarily to the experiences of their own firms, with an indication that such experiences are typical of other members of the organizations purportedly represented. In addition to these shippers and shipper organizations, the Department of Defense (Defense Traffic Management Service) and the Department of the Interior (Bureau of Commercial Fisheries) support the position of REA.

[4] American Trucking Associations, Inc., National Motor Freight Traffic Association, Middlewest Freight Bureau, Middle Atlantic Conference, Southern Motor Carriers Rate Conference, Central & Southern Motor Freight Tariff Association, Short Freight Lines, Inc., of Bay City, Mich., Parker Motor Freight, Inc., of Grand Rapids, Mich., W. T. Byrns Motor Express, Inc., of Watertown, N. Y., Law Motor Freight, Inc., of Nashua, N. H., Northern Freight Lines, Inc., of Gainesville, Ga., Carolina Freight Carriers Corporation, of Cherryville, N.C., Pike Transfer Company, Inc., of Newnan, Ga., Pacific Intermountain Express, Co., of Oakland, Calif., Indiana Transit Service, Inc., of Indianapolis, Ind., Roadway Express, Inc., of Akron, Ohio, McLena Trucking Company, of Ohio, E. J. Scannell, Inc., of Somerville, Mass., Consolidated Freightways Corporation of Delaware, (Central and Eastern areas) Chicago, Ill., Carolina Delivery Service Co., Inc., of Charlotte, N. C., Superior Forwarding Company, of St. Louis, Mo., and Garrett Freightlines, Inc., of Pocatello, Idaho.

[5] Republic Carloading and Distributing Co., Inc., National Carloading Corporation, Acme Fast Freight, Inc., and Universal Carloading Co.

No. MC-37, *Commercial Zones and Terminal Areas*, 54 M.C.C. 21, (herinafter referred to as MC-37 commercial zones or terminal areas),[6] which were promulgated pursuant to the authority contained in part II of the act, while REA has considered its terminal areas to be controlled by tariff publications subject, when appropriate, to Commission review under part I thereof. This of course, raises the subsidiary question of the exact status of REA, whether all phases of REA's presently certificated motor carrier activities can or should be appropriately regulated under part II as are those of other motor carriers, the extent of its terminal area services subject to regulation under part I, and whether sound administrative policy requires or dictates any particular result or solution.

The examiner found that REA's conduct of motor carrier operations beyond the limit of MC-37 terminal areas actually constitutes the performance of line-haul motor movements for which specific authority is required, and that to the extent such operations are conducted without specific authority, they are unlawful. He further found that while REA also utilizes rail service for line-haul movements, there is no reason to vary the geographical limits of a terminal area according to the mode of line-haul service utilized in moving traffic to and from the terminal, and that the maximum extent of the area in which express pickup and delivery services may be performed should be the same MC-37 terminal area for both line-haul rail and motor traffic.

Positions of the Various Parties

The positions taken and the evidence adduced by the respondent, the motor carrier and freight forwarder industries and individual members thereof, and by the shipper representatives, demonstrate an appreciation of

[6] MC-37 terminal areas are specifically described for some points and determined by the uniform application of a population-mileage formula for others.

the scope and significance of these problems. Since the contentions and positions of a number of these parties (as expressed in the course of the hearings and in briefs, exceptions, replies, and presentations at oral argument) parallel each other in a number of respects, they will be considered together where possible to avoid unnecessary repetition and will be separately stated only where necessary for clarity of discussion. Those contentions not specifically discussed or reflected in our findings herein have nevertheless been considered and found not justified, beyond the scope of this proceeding, or unnecessary to a proper determination of the issues presented.

Respondent and its supporters collectively contend that the examiner's recommendation (that the geographical scope of REA's terminal areas should be limited to those prescribed in MC-37) is premised upon an erroneous interpretation of the act and past precedents and, further, that his conclusions fail to consider either the disastrous effect of such curtailment on a necessary express service or the adverse impact on the viability of the only carrier presently providing such service. They recognize, however, that the existence of dual terminal areas based on the mode of line-haul service utilized, which were referred to in the *Nashua* proceeding, *supra*, would create problems in the segregating and handling of all shipments.

They argue that both legally and as a matter of policy there is no need to impose MC-37 terminal area limits on any pickup and delivery services connected with REA's express traffic. Accordingly they collectively assert that the examiner did not adequately consider the unique character of REA's service; that the public depends on REA for the handling of small shipments, unusual items, and services which are uniquely the business of an express company; that the examiner's proposed solution would unjustly diminish the utility of a service on which the shipping public has come to rely; that the expansion of pickup and delivery service to points not heretofore served by REA is minimal; that the Commission has long

recognized that pickup and delivery service comprises one of the distinguishing features of express service; that respondent's recently inaugurated "key-point" terminal consolidation program and concomitant modification of the territorial limits within which terminal services are provided was designed for, and has resulted in, the greater economy and efficiency necessary to the coordinated handling of small-shipment traffic; that the Nation's continuing development requires the expansion of express pickup and delivery limits in a manner responsive to public need; that the terminal services of an express company ought to be regulated only under part I of the act regardless of the underlying mode of line-haul transportation because the express character of the service remains unchanged; that the examiner failed to consider or properly interpret section 203(a)(14) of the act; and that REA's recently intensified handling of larger shipments of general commodity freight has not changed the nature of its service or inhibited the growth of the regulated motor carrier industry. Lastly, they assert that REA's tariff listing pickup and delivery service limits is subject to Commission scrutiny and investigation as well as to legitimate attack by other carriers.

In reply, the intervening motor carriers and freight forwarders and the Bureau of Enforcement, who generally oppose respondent's position, submit that REA actively competes with other carriers of general freight and should not be given special treatment, but rather should be subject to the same MC-37 standards applicable to them; that despite REA's performance of a specialized express service not generally available from other carriers, shippers' needs are not a relevant factor in determining the scope of its terminal area; that evidence is lacking of any actual adverse effect on shippers from the limiting of REA to MC-37 terminal areas; that because terminal area services connected with line-haul rail movements are subject to reasonable limitations under part I of the act, the MC-37 criteria constitute reason-

able and workable standards which should be uniformly applied to express terminal areas even where the line-haul movement has been by rail; and that REA's new consolidated terminals have no specific identification with named base municipalities as do motor carrier terminal areas generally.

Lastly, these parties argue that if REA is to be allowed to set its own terminal areas, motor carriers and freight forwarders must necessarily receive the same latitude in order to compete. In this regard, the motor carriers at present find MC-37 zones to be adequate and within limits which are well known to all interested parties, both carriers and shippers. However, the Bureau of Enforcement and, to a certain extent other interveners see a distinction between the unique aspects of an express service, on the one hand, and the handling of general freight, on the other; on a proper record, some of these parties would apparently not object to more extensive terminal areas being authorized in instances where such unique express services were being rendered.

Additionally, a procedural point is raised. Several shipper interveners[1] have jointly moved to strike a portion of the joint reply of the motor carrier interveners to their previously filed exceptions; and the motor carrier interveners have replied to this motion. The thrust of both motion and reply relates to the manner in which certain statements of a particular witness should properly be characterized. Since the witness' entire statement and the cross-examination thereon is of record, and has been considered in context, we find no cogent reason to grant the motion, and it will, therefore, be denied.

The evidence, the examiner's recommendations, the exceptions, and the replies to the report and recommended order have been considered. We find the examiner's fac-

[1] The National Small Shipments Traffic Conference, Inc., Drug and Toilet Preparation Traffic Conference, and Eastern Industrial Traffic League, Inc.

tual statement to be correct in most material respects. The facts will be restated here only as needed to clarify our discussion of the issues, to show the pattern of operations presently conducted by REA, the intervening motor carriers, and freight forwarders, and to describe the general position of the shipper interveners in support of respondent.

THE BACKGROUND AND SCOPE OF RESPONDENT'S OPERATIONS

Initially, we feel that it would be helpful to succinctly describe the perspective from which the various parties generally view the present express terminal area situation. As a basis for this consideration, REA, the sole express company respondent, has submitted evidence describing the various types of motor vehicle operations and services typical of those maintained throughout its entire system and justifying the manner in which its terminal areas are described and services offered. The shipper interveners seek to show how they utilize and depend upon REA's transportation services, including those within terminal areas, while the opposing motor carrier and freight forwarder interveners stress certain of its terminal area practices and operations which they consider unlawful or contrary to their best interests from a competitive standpoint.

REA's operations.—The nature and character of the services and operations of express companies in general and of REA in particular are set out in numerous proceedings. See, *e.g.*, *Railway Exp. Agency, Inc., Extension —Nashua, N. H., supra*, and *Railway Exp. Agency, Inc., Determination of Status*, 21 M.C.C. 161. It is sufficient here to note that all express companies were brought under regulation, at least insofar as their rail operations were concerned, by the Hepburn Act of 1906 (34 Stat. 584), which amended the definition of a common carrier in section 1(3) of the Interstate Commerce Act to in-

clude express companies therein. REA is then a common carrier by express subject to part I of the act.

REA was formed in 1929 after several earlier successive mergers of other express companies. While a review of the present corporate organization, ownership, and control of this carrier is not necessary here, it is significant that it was organized by and continues to be wholly owned by a number of railroads, that it operates under an agreement to which most of the Nation's railroads are parties,[*] and that the present agreement which was entered into with these railroads in 1959 after it had suffered losses for several years gives it freedom to select any mode of transportation for the movement of express traffic, including motor carriers which it either operates or with which it has contractual arrangements. REA also holds numerous motor carrier certificates authorizing line-haul operations in express service, and uses the services of air and water carriers for the transportation of a portion of its traffic.

Pickup and delivery service has been provided by REA for many years at a number of the points it serves, often by local equipment. The importance of this pickup and delivery service and the terminal areas within which it is rendered had been apparent in earlier proceedings concerning railroads. Accordingly, when a review of the tariffs and rate structures of express companies was instituted in 1912 in order to clarify and simplify them, one of the principal results was the requirement that the geographical limits of the terminal areas in which free pickup and delivery service was to be provided be set out in the express companies' tariffs to give adequate and informative notice to shippers. At the present time, REA's A-4 tariff sets out a description of the pickup and delivery

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[*] The agreement currently in effect with the approval of the Commission was discussed and approved in *Express Contract*, 1959, 308 I.C.C. 545.

limits or terminal area of each office where such services are provided, and its A-3 tariff is a joint directory of express stations indicating the type of service available at its various offices. A blanket special permission [9] issued in 1929 allows this carrier to make changes in these tariffs on 1 day's notice.

REA has always determined which offices are to provide pickup and delivery service and the geographical scope thereof. However, during this decade, certain modifications in its operational pattern related to technological, legal, and economic developments have resulted in changes and refinements in the matter in which the placement and size of such terminal areas are determined. More specifically, the principal factors which led to the restructuring of REA's operational approach to the design and utilization of terminal areas were the construction of modern highways, the flexibility inherent in the greater use of motor vehicles for its traffic, a significant reduction in the passenger rail service previously used for express service, and the removal in the 1959 Express Contract of certain strictures (noted previously) as to the required use of railroads.

Important operational changes were made by REA as a result of these factors. The most significant and the one of prime concern to us here resulted in reducing the number of smaller offices by the consolidation of many into larger and more efficient terminals. As a part of this consolidation, the "key-point terminal" program was initiated, partially implemented, and its extension budgeted. Briefly, this is a long-range and well financed construction program with the avowed aim of substituting large "key-point" terminals equipped with modern automated materials handling equipment and capable of processing large volumes of traffic in lieu of numerous smaller offices where operations of this character would not be feasible. As a

[9] Special Permission Order No. 92238 (March 2, 1929).

result, in 1963, REA operated only two-thirds of the offices maintained in 1958. The consolidated terminals are in general centrally located in their service areas rather than tied to specific base municipalities or MC-37 commercial zones. Pickup and delivery service is provided by motor vehicle in a manner akin to peddle service.

This consolidation of offices has thus produced a concomitant enlargement of the terminal areas served by existing offices. These newly enlarged terminal areas generally embrace territory previously served from smaller offices on REA's certificated motor regular routes and also include areas adjacent to some offices at which terminal services were not previously available. These larger terminal areas may also include points formerly without pickup and delivery service or points previously served by rail alone. It further appears, however, that in some instances, REA serves points which its tariff indicates are within the confines of one terminal area from a point located in an adjacent terminal area. This evidently has occurred at places somewhat removed from the center of a particular terminal area, such as at points in rural Georgia and on the periphery of REA's present Boston terminal area. Moreover, there appear to be some discrepancies between the A-3 and A-4 tariffs in their description of the service available at some points. As a result of the operation of peddle-type pickup and delivery service within what are often fairly extensive areas, REA has then been providing service to points which are some distance from its terminals. As indicated, these points may or may not have received pickup and delivery service previously but were generally located in closer proximity to a given REA office.

At present, REA has 3,220 offices of which 2,200 provide pickup and delivery service. Of the latter, some 750 points have defined terminal areas which exceed the MC-37 commercial zone limits, frequently to a significant degree. Approximately half, or 474, of these latter points

confine their pickup and delivery service to areas extending less than 10 miles beyond the MC-37 zone; but some of the remainder serve points as far away as 50 miles. More specifically, 180 offices provide service to points 10 to 20 miles distant from the MC-37 terminal area, 73 to points within 30 miles thereof, and the remaining 23 to points between 30 and 50 miles away. These 750 offices serve approximately 5,000 points having a total population of some 75.4 million and make up 60 percent of the 120.9 million people to whom REA express service is available and a like percentage of respondent's total revenues. Some 2,771 points having a total population of 16 million lie beyond the MC-37 areas, and of these points 1,436 lie more than 10 miles beyond the MC-37 areas.

As heretofore noted, REA has historically set its own terminal areas by tariff publication; and the extent of the terminal area to be served from a particular office is attributable solely to its management. Although the advent of the consolidated terminal has not changed this procedure, respondent has, however, keyed the designation of these terminal areas to a study and appraisal of the shippers' needs in relation to the economic feasibility of the service to be provided in a particular area. More specifically, in making this analysis, a number of factors were considered, including *inter alia* the density of the population, the nature of the highway system, the volume of traffic, the type of equipment required, and the location of shippers. Moreover, the rapid development of suburban areas with their residences, commercial establishments, and industries has had its effect.

Greater reliance on motor vehicles for line-haul movements has reduced the amount of express traffic moving by rail, although this continues to be the principal mode used. At the present time 87 percent of the 750 offices mentioned previously whose terminal areas exceed the MC-37 zones receive or dispatch at least some portion of the line-haul traffic handled by motor vehicle. Since all

surface express shipments are handled without distinction as to their mode of transport, REA asserts that the limitation of its motor carrier operations to MC-37 commercial zones would be unjustified and only foster confusion and inefficiency.

In addition to its terminal program, REA has in recent years shown great interest in obtaining, and has actively solicited, large shipments of various commodities to produce what is termed a better "mix" with the smaller shipments traditionally handled. In order to attract this traffic it has filed aggregate, unit, and volume rates, which have been the subject of previous consideration.[10] As a result, it has obtained what it considers to be a better "mix" of large and small shipments to the extent that the revenue realized per shipment has risen from $5 in 1959 to $6 at present. The average weight per shipment, however, has increased during this same period only from 45 to 51 pounds.

The pertinent portion of the evidence adduced by the numerous shippers, and shipper organizations, as well as by the Government agencies listed in footnote 3 may be summarized for the sake of brevity. Collectively, they utilize and rely upon REA's service for a substantial portion of their shipments. Many have specialized or distinct requirements in the handling of small shipments which cannot adequately be met by general freight carriers, particularly in the shipment of live animals, fresh citrus fruits, and commodities requiring re-icing, protection against the vagaries of weather, or security afforded by armed guards. Other shippers, particularly retail stores and their suppliers, rely on express service for the shipment of goods between supplier or warehouse, on the one hand, and retail outlets, on the other, or between re-

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[10] See *Men's and Boys' Outerwear—Bruceton, Tenn., to U.S.A.*, 325 I.C.C. 284, *Freight, All Kinds, L.C.L., Container Charges—U.S.A.*, 323 I.C.C. 468, and No. 34310, *Freight, All Kinds, L.C.L., Unitized Charges—U.S.A.*, 326 I.C.C. 594.

tail stores, on the one hand, and individual customers, on the other.

In addition, the Department of Defense, which is one of the largest users of express service in the world, relies upon respondent for the transportation of numerous items from and to various military installations, suppliers, and contractors located throughout the Nation. Some 200 of the military installations under consideration in this proceeding which presently receive express pickup and delivery service lie beyond presently denominated MC-37 terminal areas.

While many of the shipper interveners operate businesses located within presently established MC-37 terminal areas, others do not; and the evidence submitted of the nature of their customers and the manner in which they utilize express service conclusively establishes that they either ship or receive a significant volume of shipments destined for delivery beyond the present MC-37 terminal areas.

Evidence in opposition to REA.—The general thrust of the evidence presented by the motor carriers, freight forwarders, and their respective associations, listed in footnotes 4 and 5 may be briefly summarized. A number of motor carriers, particularly those operating over regular routes, have a genuine interest in the handling of less-than-truckload freight; in some instances a significant percentage of a particular carrier's gross revenue is attributable to such traffic. While statistics in prevalent use classify shipments of less than 10,000 pounds as small shipments—a figure which is considerably larger than the average weight of the shipments handled by REA—there is evidence that in the midwestern area, for example, approximately 87 percent of the less-than-truckload shipments under 10,000 pounds actually weighed an average of 238 pounds and that 37 percent of all less-than-truckload shipments were billed at a minimum charge. However, it also appears that these motor car-

riers have higher minimum weight requirements than REA and do not uniformly handle items of a perishable nature or those requiring specialized services.

The remaining testimony of the motor carriers and freight forwarders generally falls into two categories. First, there is considerable evidence as to the loss of traffic generally by these carriers, which was submitted with comparisons of their rates and those of REA applicable thereto. Aside from this general evidence, one instance is cited where a motor carrier lost a substantial portion of a shoe manufacturer's account to REA when the latter extended its terminal area a distance of some 10 miles through rural territory to encompass the shoe factory. This instance is particularly illustrative of a portion of the problem before us here, as REA had formerly maintained an office in the shipper's town although it had used rail service rather than motor vehicles in the handling of past shipments for that factory.

Secondly, there is much evidence relating to various types and levels of rates instituted by REA in recent years. In view of our conclusions hereinafter as to the pertinence of this material, we will not discuss it further at this point.

Discussion and Conclusions

Preliminary matters.—We believe that our discussion of the basic issues involved requires that we first dispose of certain other matters raised and pressed herein. The question has been raised whether we should accept the view of some of the parties that a difference exists between what they term "true express service," on the one hand, and, on the other, "general freight service," and that REA is providing both, and particularly the latter. We have in numerous proceedings,[11] including several re-

[11] *Railway Exp. Agency, Inc., Extension—Nashua, N. H., supra,* and proceedings cited therein; *Freight, All Kinds, L.C.L., Container*

cent cases, discussed the nature of express service extensively, and for this reason a detailed recapitulation of the conclusions reached therein is unwarranted. It is sufficient to point out that any attempt to redefine or delimit the term "express service" is both collateral to and beyond the scope of this proceeding, which, as noted previously, is limited to an examination of the appropriate geographical scope of terminal areas where pickup and delivery service may be rendered by an express company. Moreover, the record is devoid of any probative evidence that REA is not functioning as an express company in accordance with the criteria enunciated in the cited cases. Accordingly, our ultimate conclusions here must be based upon, as well as limited to, the proposition that all of the traffic handled by REA is, in fact, moving in "express service" as that term has been defined, particularly in view of the extensive consideration previously given this matter.

Further, we see no need here for an extensive discussion of that portion of the evidence introduced by the interveners in opposition which relates solely to the general level and type of rates on various sizes of REA shipments vis-a-vis rates maintained by motor carriers or freight forwarders, nor to consider any purported effects of such rate levels. This type of evidence is not relevant to the issue before us, and the act provides appropriate means for challenge and review of such matters. Moreover, such evidence has no relation to terminal areas and fails to establish a functional relationship between any particular loss in traffic by motor carriers or freight forwarders and any increase in REA's traffic or revenues. As noted above, REA's motor carrier certificates are uniformly limited to the transportation of general commodities "in express service," and insofar as respondent com-

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Charges—U.S.A., supra; Railway Exp. Agency, Inc., Ext.—Traverse City, Mich., 96 M.C.C. 727, and *Railway Exp. Agency, Inc., Ext.—Chicago-Cincinnati*, 98 M.C.C. 92.

plies with our previously stated requirements for such transportation, it may handle the various types of commodities involved in those proceedings in the manner described therein.

Principal issues.—Express service has held a significant and unique position in this Nation's transportation system for over a century. Extensive discussion of its genesis and development may be found in a number of prior Commission reports spanning the past half century.[12] While certain particularly significant portions of this history are of value in placing the present issues in proper perspective both from the standpoint of regulatory policy and the requirements of the public (and thus will be noted at appropriate places in our further discussion here), the gravamen of the positions taken by the various parties, both carriers and shippers, relates chronologically to the place in our present transportation system of express service and pickup and delivery within terminal areas, rather than to an isolated and narrow technical or historical question. We will, therefore generally confine our discussion and conclusions to the present and foreseeable future rather than to the past. We harbor no doubt of the desirability and appropriateness of this approach, particularly in view of the nature of the voluminous record compiled, the general approach of the larger number of parties participating, both Government and non-Government, and the content of their positions in the extensive oral argument held in this matter.

Accordingly, we are chiefly concerned here with the effect of terminal area definition and usage on the direction of future development envisioned for express and its relationship with motor, rail, and freight forwarder serv-

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[12] See, *e.g. In Re Express Rates, Practices, Accounts and Revenues*, 24 I.C.C. 390 and 28 I.C.C. 131, *Express Rates, 1922*, 83 I.C.C. 606, *Railway Exp. Agency, Inc., Determination of Status*, 21 M.C.C. 161, and *Railway Exp. Agency, Inc., Extension—Nashua, N. H., supra.*

ices in the intricate mosaic of an effective transportation system best able to meet the needs of the public. In judging the merits of the various positions advanced in such a significant area of transportation it is of particular importance that we keep before us as a lodestar the pertinent principles embodied in the national transportation policy by which we are admonished and directed to administer and enforce all of the provisions of the act with a view—

> to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this act [Interstate Commerce Act], so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discrimination, undue preferences or advantages, or unfair or destructive competitive practices; * * *—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the postal service, and of the national defense. * * * [54 Stat. 899]

Initially, we recognize that the MC-37 criteria utilized in setting the terminal areas for motor carriers subject to regulation under part II and freight fowarders subject to regulation under part IV of the act have been effective for many years and have won almost universal approval. The real question to be considered here then is whether, in the light of the national transportation policy, this formula can or should be uniformly applied in the setting of terminal areas for express service. We think not, for we are persuaded that the attempt to do so would fail to recognize and adequately preserve a public service having certain unique and important attributes

which clearly distinguish it from other forms of transportation.

In other words, we recognize that express service has a distinctive character and that we cannot overlook the numerous benefits presently made available to the public which are generally unavailable from other types of carriers. They include *inter alia* the transportation in express service of general merchandise of almost every description as well as commodities of unusual value, those requiring special care or protection, and those injurious or contaminating to other lading. On the other hand, we have consistently recognized certain distinctions between express service and other transportation services.[13] Even more important and of greater significance than the uniqueness of express service, however, is the extent of public dependence upon it.

The important fact then, is that REA is an express carrier. It is this type of service and the form of its availability to the public, not the underlying modes of surface transportation employed therein, that are to be given prime consideration in relation to any particular facet of express operations, including the permissible scope of terminal areas in which pickup and delivery service can be provided. Unquestionably there is diversity in the underlying transportation utilized to perform express service because all modes, including motor, are employed. However, in looking at the real substance of express service, we conclude that the whole is greater than the sum of the parts, and that an atomized approach would be unproductive, lead to confusion, and disregard the integrity of the service that respondent provides.

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[13] For example, a grant of "general commodities in express service" precludes the transportation of bulk commodities which could be transported under any otherwise unrestricted grant of general commodity authority, and certain specific restrictions are uniformly imposed upon grants of motor carrier authority to express carriers.

In the absence of compelling circumstances, we see no reason to chain express operations to a formula tailored solely to the specific underlying modes of transportation used, particularly where the problems and services related to REA's multi-modal operations differ substantially from those peculiar to the separate modes and the application of such criteria could impose obstacles of such substantial nature as likely to impair the evolution and development of express service.

Free pickup and delivery is basic to and intrinsically a part of transportation performed in express service, where it can be feasibly and economically offered. Moreover, we have recognized that terminal areas within which it may be offered, unlike commercial zones, are related to the carrier as much as to the points served and further, that they may differ depending on the type of carrier.[14] Thus, express being a different mode, we see no reason why REA terminal areas may not differ in size from those of the modes of underlying carriage it may utilize, including motor carriers, if there is some objective reason. We cannot properly overlook differences in the character of express operations and the operations of other modes of transportation which call for divergent rather than similar treatment.[15]

The question is whether the MC-37 criteria heretofore tailored to meet the demonstrated needs and requirements of other types of carriers should be equally applicable to an express service or whether different criteria are war-

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[14] *Commercial Zones and Terminal Areas*, 54 M.C.C. 21, 58, 70.

[15] This view is, of course, also consistent with our treatment of freight forwarding which is another indirect mode of transportation. While we did determine in the *Commercial Zones and Terminal Areas* proceeding, *supra*, that MC-37 terminal areas could and should appropriately be applied to freight forwarders' operations, this result was reached only after a separate consideration of their specific requirements as indicated by the evidence and pleadings and was not predicated solely upon the findings made with regard to motor carrier terminal areas. See 54 M.C.C. 74.

ranted by the nature of the service. As indicated, express is a unique service and its concomitant, pickup and delivery service, has become even more important as numerous REA offices located in smaller communities are closed for economic and technological reasons and the availability of the express service previously rendered can only be assured by the consolidation of contiguous territory into larger terminal areas with more efficient facilities. We further note that these and other changes in REA's operations are not fanciful but rather objective, in light of that carrier's inability to maintain uneconomic small stations and the discontinuance in many cases of rail passenger service adequate to meet its needs.

The record as a whole indicates clearly and dramatically the magnitude of the potential adverse impact upon a service now available to a substantial segment of the population were express terminal areas to be restricted to MC-37 zones. Thus faced with the reality of some 16 million people together with numerous industrial, retail, and military facilities being deprived of express service they presently receive and depend upon and at the same time being fully cognizant of our responsibilities under the act and the national transportation policy, we recognize that adequate provision for the continuation of this service must be made.

We have recognized on numerous past occasions that transportation constantly faces new concepts and changing conditions. To meet the needs of this dynamic industry and to best serve the public we have consistently strived for flexibility.[5] In the long history of express

[5] For example, sufficiently broad authority has been granted to existing motor carriers to enable them to handle commodities which had undergone technological changes in composition. *Pennsylvania-Ohio Exp., Inc., Ext., Refractory Products*, 96 M.C.C. 449. The advantages and economies inherent in allowing trip-leasing have been recognized. *Owens Contract Carrier Application*, 100 M.C.C. 34. Proceedings have been instituted to remove restrictions which apparently do not contribute to efficient transportation of small

service, technological changes have now placed new emphasis on a facet of these operations which has heretofore generated no great interest among the various carriers. We are of the opinion that a need for continued flexibility is apparent.

In the absence of any substantial showing that the public interest would best be served by confining pickup and delivery to the more limited MC-37 terminal areas, we must proceed upon the policy of recognizing and encouraging express operations as one of the most practicable available means towards coordinating the various modes of transportation, particularly with regard to the handling of small shipments and the provision of special services, and that the boundaries of REA's terminal areas should be determined in this frame of reference.

The motor carrier intervenors, on the other hand, have indicated their general satisfaction with MC-37 areas, because, *inter alia*, they know the geographical scope of their own and their competitors' service area. They do, however, consider certain of REA's operations and rate policies inimical to their interests and an incursion into their traffic.

While it cannot be denied that some motor carriers and freight forwarders may be affected by competition from REA generally, and particularly when this carrier may make a reasonable extension of one of its terminal areas, the real crux of their opposition appears related primarily to rates and to REA's intensified solicitation of larger shipments, which, as indicated, are not appropriate mat-

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shipments and to effect conversions of operating rights necessary to assure the distinction between regular- and irregular-route carriers in the light of changed conditions. Compare *Midwest Motor Exp., Inc., Ext.—Intermediate Points*, 96 M.C.C. 402, and Ex Parte No. MC-68 *Removal of Truckload Lot Restriction*. Finally, the situation with regard to bimodal surface transportation provided in the form of trailer-on-flatcar (TOFC), has been studied and resolved. *Substituted Service—Piggyback*, 322 I.C.C. 301, affirmed 387 U.S. 397 and 388 U.S. 445.

ters for consideration here because of their limited and peripheral relation to the terminal area question. In any event, it appears that REA has previously provided express service to points in most areas which might now be encompassed within an extended terminal area; and since, as indicated, we consider REA as an express company and not primarily as an operator, owner, or user of a particular mode of underlying transportation, we may also consider and evaluate the fact that respondent may have previously served a given point if its extension of a terminal area to serve that point from another office is at issue in any proceeding.[17] We note too that REA has typically held itself out to handle all freight tendered and that to date the increased solicitation of larger shipments than it generally handled in the past has had a minimal effect on the average size thereof. Moreover, as indicated previously, express service is a distinct form of transportation. Other carriers do not generally purport to offer the same unique services which REA makes available and for which the shipper interveners in support of REA have demonstrated a continuing need.

The freight forwarders, while providing a type of transportation somewhat akin to that of express service, have failed to show convincingly their ability to provide a comparable service in certain important respects which are essential to the public's demonstrated needs. For example, they generally do not operate over the shorter-line-haul distances, and, more to the point, they, like motor carriers, do not usually handle many of the commodities routinely transported by REA or provide respondent's special services.

In summary, then, we conclude the record shows sufficient distinctions between the express service provided by REA and the transportation services provided by other modes of transportation subject to the various parts

[17] See *Collection and Delivery Limits at Harrisburg, Pa.*, 281 I.C.C. 379.

of the act to justify greater flexibility in the pattern of express company terminal areas than in the MC-37 findings made applicable to the latter carriers in the *Commercial Zones* case. The alternative would, in our opinion, produce such a rigidity in the structure of express service as to make it unresponsive to the demonstrated needs of the shipping public. In the *Commercial Zones* proceeding, *supra*, we noted that while it is not practicable to make distinctions in terminal areas with regard to the same type of carrier, it is not unreasonable to conclude that the terminal areas at a particular place for different types of carriers may vary in size because of essential differences in their services. Moreover, the cited proceeding did not affirmatively purport to consider or prescribe the terminal areas of express companies.

We conclude, therefore, that terminal areas in which free pickup and delivery service may be rendered by an express carrier should be sufficiently extensive to serve the needs of the public, that they may appropriately continue to be set by express companies in the same manner as heretofore, and that their size at particular points need not vary with the nature of the surface mode of transportation utilized in the express line-haul movement.

Such express terminal areas are subject, however, to our review in the manner in which this has previously been accomplished under part I of the act. In such a review, important factors other than the commercial contiguity between the points in a terminal area and the base municipality may be considered and evaluated to the end that an express service which is readily usable may be available to substantial segments of the public.

In view of the paucity of proceedings in which this matter has heretofore arisen, we are of the opinion that an analysis or enumeration of particular instances in which other factors were considered would be of limited utility and fail to result in detailed criteria applicable to future situations, many of which are incapable of pre-

cise delineation in advance. In this regard, we note, however, and wish strongly to emphasize the need of a reasonable geographic relationship between the points included within any terminal area. In our view, the application of reasonable criteria should, in most instances, result in a basically symmetrical and reasonably shaped terminal area. Accordingly, any approach that may be utilized by REA which is patently weighted heavily towards the inclusion within a terminal area of remote single major sources of traffic without regard either to lesser sources of traffic or the size of the extension (by a sort of "gerrymandering" process, of which there is some indication in this record), may be immediately subject to review on our own motion or at the request of other interested persons, and may be found unreasonable. Frequent occurrences of such a situation would, of necessity, tend to abuse the basic rationale underlying our conclusions here and could give us cause to reconsider and further evaluate these conclusions in the light thereof. Further, we wish to reiterate the necessity for compliance with the requirement promulgated in 1912 that express companies accurately reflect in their tariff publications the scope of each terminal area served, and with the corollary thereof, that free pickup and delivery service rendered on each shipment within such an area actually be a "terminal service"—i.e., one performed in conjunction with a line-haul movement of that shipment to or from a point outside the given terminal area.[18]

Having found express service to constitute a distinct mode of transportation separate from the underlying modes it may utilize and one which is necessary to meet the demonstrated and often unique needs of a substantial portion of the public, we conclude that we possess sufficient authority under the act to allow the setting of ex-

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[18] See, *e.g.*, *Delaware, L. & W. R. Co. Extension—Corning, N.Y.*, 53 M.C.C. 614.

press terminal areas which may differ from those of motor carriers and freight forwarders.

Part I of the act clearly invests us with authority to determine the reasonableness of a terminal area to the extent REA may be subject to this part and as an incident to such rail service as it may utilize. Cf. *Express Rates*, 1922, 83 I.C.C. 606. We think that since REA has the status of an express company subject specifically to part I, the same conclusion follows with regard to terminal service performed as an incident to its motor line-haul operations. Part II of the act, and particularly sections 202(c) and 204(a)(6) thereof, authorizes us to regulate the size of these terminal areas insofar as REA may be subject to that part. Accordingly, if REA is regarded solely as a motor carrier for all purposes when utilizing motor vehicles by virtue of the fact that it performs line-haul movements under appropriate motor carrier authority—and as indicated, we do not agree with the correctness of this proposition—then there is still no requirement in setting terminal areas that they be the same for all motor carriers if there is a reason for a difference. Cf. *Commercial Zone* cases, *supra*, particularly page 105, and *Greyhound Corp.—Investigation of Certificates*, 84 M.C.C. 169.

We are content, therefore, to rest our conclusions here on the legitimate exercise of the statutory authority vested in us by the act in the light of the national transportation policy. Our conclusions would not differ whether or not respondent's express terminal area motor operations in connection with line-haul motor movements fall within the affirmative definition of a common carrier by motor vehicle in section 203(a)(14) of the act rather than within the exception thereto, so as to make them subject to regulation under part II rather than under part I of the act. We feel, however, that it would be desirable also to consider and discuss the application of section 203(a)(14) of the act, particularly in light of the

conclusions reached in some prior proceedings. While these proceedings are not squarely on point, our study of them highlights the observation made by division 1 in *Barton Truck Lines, Inc.* v. *Railway Exp. Agency, Inc.*, 95 M.C.C. 625, that there is a distinct difference of opinion as to the correct interpretation to be placed thereon as well as on the aforementioned section of the act.

Section 203(a)(14) defines a "common carrier by motor vehicle" which is subject to part II of the act as follows:

> any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, *except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I.* [Emphasis supplied.]

The question presented is whether the terminal area service performed with motor equipment by REA prior to the enactment of part II was subject to regulation under part I. If it was, then this transportation continues to be subject only to part I of the act because it falls within the italicized exception to the definition quoted above. If not, then it may be subject to regulation under part II of the act.

In approaching this problem, it is necessary initially to consider the historical development of the type of terminal operations involved here in order to put the matter in the proper perspective. Long before the passage of the Motor Carrier Act in 1936, which incorporated part II into the Interstate Commerce Act, express companies had been utilizing other modes as well as rail service. Cf. *Express Cases*, 117 U.S. 1. During such

period, the conclusion was reached in several decisions that collection, delivery, and transfer services performed within terminal areas by motor vehicles of carriers subject to part I of the act, which clearly included express companies, were subject to economic regulation because they fell within the definition of the "transportation" subject to section 1(3) of the act as accessorial services. Compare *Coordination of Motor Transportation*, 182 I.C.C. 263; *Motorbus and Motortruck Operation*, 140 I.C.C. 685; and *Tariffs Embracing Motortruck or Wagon Transfer Service*, 91 I.C.C. 539. At the same time it is significant to note that in *American Highway Frt. Assn., Inc.*, v. *Ry. Exp. Agency, Inc.*, 201 I.C.C. 755, which was also decided before the enactment of part II, it was recognized that no part of the line-haul transportation performed by motor vehicle was subject to regulation under part I but that that portion of the express business which was subject to our jurisdiction at that time was that which was handled over railroads or partly by rail and partly by water. In 1939, after the passage of the motor carrier act, in the *Determination* case, *supra*, this broad view was followed so far as the conclusions with regard to motor line-haul transportation were concerned, although, in the same proceeding, express tariffs covering terminal services alone were accepted for filings as has consistently been our general policy. See *Determination* case, at 21 M.C.C. 185.

In the *Nashua* case, *supra*, we recognized the posture of the various precedents, particularly the *Determination* and *American Highway* cases; and based upon our reading of the conclusions reached in these earlier proceedings, we at that time tentatively concluded that terminal accessorial services associated with an interstate line-haul movement by motor vehicle were not considered to be subject to regulation under part I prior to the enactment of part II, and that, therefore, this type of terminal area transportation became subject to part II regulation

in 1936. However, we recognized certain problems inherent in such a conclusion when we stated:

> This state of the law is apt to foster unnecessary legal complications in what should be a relatively simple carrier-shipper relationship. Unless the effect and applicability of various provisions of law are coordinated, it would seem that the maximum pickup and delivery zones at a given community incident to a line-haul shipment by a common carrier by express, such as REA, would vary depending upon whether the transportation has been by means of rail or motor vehicle. We do not view this as a tolerable situation, * * * (page 338)

It is apparent that the specific question now before us has never been squarely decided and that the tentative conclusion reached in the *Nashua* proceeding was not based on any particular study of the total problem and was made only with some reservations. In short, it was therein stated that:

> In these circumstances, rather than attempt now to reach a definite and final resolution of these problems, we shall with a view toward the institution of a separate proceeding in which these matters may be further developed and examined, at this time simply define the broad outlines of REA's unique status in conducting motor operations in terminal areas. (page 335), and * * *
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> At this time, we conclude that it would be in the public interest to institute a specific proceeding with the purpose of defining the terminal area of an express company as that type of carrier is regulated by the Interstate Commerce Act as a whole. (page 338)

Moreover, there is some question as to the universal applicability of the conclusions reached in the *American Highway* proceeding in view of the particular factual situation involved there.

The question of the applicability of these precedents to express terminal areas connected with line-haul motor movements (as distinguished from line-haul movements themselves), and particularly the principal one cited, the *Determination* case, is further demonstrated by the position taken by the Legislative Committee of the Commission on the proposed Transportation Act of 1940. In a letter dated more than a month after the decision in the *Determination* case, in reference to the proposal to exempt those motor express operations from part II which had previously been subject to part I, it was stated:

> *House bill.*—* * * It is particularly open to criticism because it * * * *leaves undetermined the controversial question as to what transportation by motor vehicle by an express company is now subject to part I.* If the House bill is used as the basis of final legislation, we recommend that this definition of "common carrier by motor vehicle" take the form proposed above in connection with the Senate bill. [Emphasis supplied.] (The Senate bill as noted, *infra*, did not contain a provision relating to part I of the act.)[19]

This proposal was, however, subsequently adopted as the exemption presently contained in section 203(a)(14) of the act.

In light of our review and study of REA's operations here, our previous conclusion that express service is a distinctive mode of transportation which should, where warranted, be treated differently in certain respects from the underlying modes of transportation it may utilize, and the longstanding question as to the proper interpre-

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[19] Letter from the chairman of the Legislative Committee, Interstate Commerce Commission, 76th Cong., 3d Sess., transmitting to the chairman of the Senate Interstate Commerce Committee and the chairman of the Committee of Interstate and Foreign Commerce of the House of Representatives a report relative to omnibus transportation legislation, S.2009 as passed by both Houses of Congress, dated January 29, 1940. (House Committee Print.)

tation of section 203(a)(14), we do not feel bound by the tentative conclusions reached in *Nashua*, which were based upon and merely reiterated the broad statements contained in the few available precedents.

Moreover, we deem it appropriate to point out that the regulatory problems sought to be dealt with and the objects sought to be attained in part II were markedly different from those that had been handled under part I. For example, under the latter portion of the act, one of the principal problems was to make known the extent of terminal areas for express and rail carriers to better serve the public and enhance the flexibility of these services, with the geographical and commercial affinity of the various points in any such area being only one consideration. Under part II of the act where there were many more carriers serving most areas, the object was to specifically recognize the extent of a commercial zone whose existence was itself tied to commercial and geographic dependence on the base municipality, with no particular consideration being given to the specific problems or needs of any shipper whose residence or place of business did not lie within that area recognized to be commercially contiguous to and dependent on the base municipality. Thus, it can be seen that the approach and criteria utilized in each instance differed and for good reason. When the proceedings cited and discussed by the parties here are viewed in this light, it is evident that while those cases that did not revolve specifically around the scope of a terminal area may be considered where informative, they can not necessarily be regarded as controlling on the particular questions presented here.

Our review of the pertinent legislative history also supports the conclusion that the broad holdings in previous decisions are inapposite to, or at least of questionable value in, the resolution of the specific issues presented here. This study reveals that the House amendment to, as well as the Senate version of, S.2009, 67th Cong. 3d

Sess. (which was enacted as the Transportation Act of 1940), provided for the exemption of terminal area services in the definition of a "common carrier by motor vehicle," which definition is the present section 203(a)(14) of the act. The Senate version of the bill excepted the motor terminal area operations of various types of surface carriers, including express companies, and also exempted the motor carrier operations of those entities performing terminal area services for express companies and the other carriers enumerated there.[20]

The House version displays a somewhat different approach, however. Thus, in subparagraph (a)[21] in refer-

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[20] S.2009, as pertinent originally provided:

> The term "common carrier by motor vehicle" means any person who undertakes, whether directly or by a lease or any other arrangement, to transport passengers or property, or any class or classes thereof, for the general public in interstate or foreign commerce by motor vehicle for compensation, whether over regular or irregular routes, including such motor vehicle operations (except when confined to transfer or terminal operations) of carriers by rail or water for forwarding companies or of express companies: Provided, That persons acting as agents for common carriers in the performance of transfer or collection and delivery service by motor vehicle within terminal areas, shall not as to such operations be deemed common carriers by motor vehicle but each such operation shall be deemed to be that of the carrier for which it is performed.

[21] The House amendment to S.2009 provided:

> The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except—
>
> (a) transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I, and
>
> (b) transportation by motor vehicle by a carrier by railroad subject to part I or by a common carrier by water subject to

ence to express companies performing terminal services, it initially employed substantially the same language as that used in the original Motor Carrier Act relating to previous part I operations. It is this that is at issue here. Next, in subparagraph (b) it gave the benefit of the terminal area exemption to other types of carriers then subject to regulation when they were performing the terminal area services themselves. In the last subparagraph, it granted substantially the same exemption in terminal areas to those persons serving all of these carriers, including express companies, as did the Senate bill.

The Conference Committee recommended the enactment of the House amendment with some changes and, as here pertinent, adopted in substance the House version of the section 203(a)(14) amendment. Cf. H. Report No. 2832, 76th Cong., 3d Sess. However, as indicated in the Conference report, the provisions contained in the House amendment as subparagraph (b) and the unlettered paragraph following it (as set out in footnote 21 herein), which related to the terminal area exemption applicable to non-motor carriers other than express companies and to those serving them, were taken out of the definition

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part III, incidental to transportation subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services which shall be considered to be transportation subject to part I when performed by such carrier by railroad, and transportation subject to part III when performed by such carrier by water.

The performance within terminal areas of transfer collection, or delivery services by motor vehicle, by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a common carrier by motor vehicle subject to this part, or a common carrier by water subject to part III, shall not be considered to be transportation by such person within the meaning of this paragraph; but such services shall, for the purposes of this act, be considered to be performed by such common carrier or express company as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water to which such services are incidental.

and incorporated in a new section, 202(c). This was done solely "for the purposes of simplification and clarification." (H. Rept. 2832, page 74.)

The purpose of the exceptions contained in both the Senate and House bills was clearly to exempt the terminal area motor operations of the named carriers, including express companies, when performed either by such carriers or by others for them. The fact that the House version, which was accepted in substance, treated the express companies separately from other carriers with respect to their motor operations in terminal areas by relating their exemption to operations previously subject to part I of the act rather than specifically to terminal areas, but treated them the same as other carriers in regard to the performance of such services by agents, indicates that express companies were clearly intended to be granted at least the same scope of exemption as the other enumerated carriers.

Since the exemption in both the Senate and House bills related solely to terminal areas, the language of the House bill, which deals with express companies in terms of operations previously subject to part I in relation to services performed by themselves rather than including them in the list of other enumerated carriers to be exempted, must be viewed in this context. The conclusion to be drawn is that, in all likelihood, all express terminal services were considered by the Congress to be subject to part I prior to the enactment of part II. Otherwise, there clearly would have been no reason to treat express companies differently from other types of carriers so far as the terminal area exemption is concerned. Moreover, in these circumstances, it is apparent that were this not the proper interpretation, we would have the anomalous situation of an express carrier which had admittedly been performing recognized terminal area services in addition to other types of motor vehicle operations for many years before the enactment of part II being rendered unable to

perform any terminal area services itself, all without any specific mention of this drastic result by the Congress.

In addition, such an express carrier could not utilize other motor carriers to perform such services for it as agent because the third paragraph of the section under consideration as it originally appeared in both the Senate and House versions of the bill (and subsequently became law as section 202(c)(2) after rearrangement) put motor carriers serving an express carrier in no better stead than the carrier served for the reason that their terminal area services would have to be "considered to be performed by such carriers," i.e., express company, and "regulated in the same manner as [the express transportation] to which such services are incidental." Obviously, such a result was not intended and is in fact, untenable.

We conclude, therefore, that insofar as the legislative history of section 203(a)(14) of the act may be of value in its interpretation, it tends to establish the intent of Congress to exempt all the terminal area operations of express companies from regulation under part II of the act and to make them subject only to part I.

FINDINGS

After consideration of the record and for the reasons stated previously, we find that an express company, and specifically the respondent, Railway Express Agency, Inc., may offer free pickup, delivery, and transfer service by motor vehicle on express shipments as an incident to its line-haul service, and that such terminal area service is exempt from all provisions of the act within our jurisdiction; and that such carrier may continue to publish rates for through transportation, which involves the rendition of pickup, delivery, and transfer services in terminal areas by motor vehicle, whether or not rail or motor carriage is used for the line-haul portion of such transportation, when the extent of such services is clearly set forth in

an appropriate tariff publication, subject to investigation, suspension, and complaint proceedings.

We further find that in the circumstances the findings and conclusions in the sixth supplemental report in Ex Parte No. MC-37, *Commercial Zones and Terminal Areas*, 54 M.C.C. 21, may not uniformly be applied to the express operations conducted by express companies, and particularly Railway Express Agency Inc., in setting their express terminal areas, although such carriers remain subject at all times to the requirements of part II of the act and our rules and regulations thereunder in all other respects so far as their motor operations and particularly their line-haul motor movements are concerned.

In the circumstances, no cease and desist order will be issued. An appropriate order will be entered.

COMMISSIONER MURPHY, dissenting:

The ambient findings of the majority appear to be divisible into two broad subject headings, that is whether there is any jurisdiction over REA terminal areas under part II and, if so, whether such jurisdiction should be exercised.

JURISDICTION

The size of the terminal areas for motor carriers subject to economic regulation under part II of the act is determined under the criteria set forth in the sixth supplemental report in Ex Parte No. MC-37, *Commercial Zones and Terminal Areas*, 54 M.C.C. 21. REA, of course, is among other things a motor carrier subject to part II of the act.

There is no specific statutory provision conferring a terminal area upon a line-haul carrier subject to economic regulation under part II. Instead the authority of such a carrier to provide pickup and delivery derives from, and is incidental to, intercity authority granted to the car-

rier. Thus for example, in *Consolidated Freight Lines, Inc., Com. Car. Application*, 11 M.C.C. 131, 136 (1939) division 5 found as follows:

> Applicant also seeks the right to provide pickup and delivery service at origins and destinations in connection with its own line-haul movements. This is ordinarily a normal part of line-haul motor carrier service, and the testimony clearly indicates that applicant, before, on, and since June 1, 1935, has continuously rendered this service in connection with its own line-haul movements. No special authorization is necessary in this respect. Where applicant is authorized to serve a particular city, this service for the present may be rendered within the commercial zone thereof, although that area may exceed the corporate limits. We will leave for our future regulation the matter of appropriate limitations in this respect.

The majority however, would find that REA unlike other motor carriers, derives its authority to provide pickup and delivery in connection with intercity motor carrier operations from part I of the act. That finding is predicated upon the view that all pickup and delivery by REA was subject to regulation under part I prior to the enactment of part II. As proof of this, the majority points out that "express tariffs covering terminal services alone were accepted for filing as has been our general policy."

The tariffs referred to by the majority designate the points or limits of the free pickup and delivery zones of REA. Nonetheless, except in circumstances such as where freight is not accepted upon the first delivery, express tariffs do not provide for charges separate and apart from the line-haul charges of REA. In fact, over the years both prior to and after the enactment of part II, the Commission has refused to grant REA permission to establish charges for pickup and delivery separate from its line-haul charges. In *Express Rates*, 1922, 83 I.C.C. 606,

655, it was concluded that " * * * the factor which includes pickup and delivery service should continue to be spread thinly and evenly over all of the traffic to which under the formula it is applicable." Accordingly, the finding of the majority that "express tariffs covering terminal service alone were accepted for filing" is no answer to the instant jurisdictional question because the regulation exerted over such filings was solely in relation to line-haul movements subject to part I.

In further support of its findings, the majority concludes that "in all likelihood, all express terminal services were considered by the Congress to be subject to part I prior to the enactment of part II" and also that "were this not the proper interpretation, we would have the anomalous situation of an express carrier which had admittedly been performing recognized terminal area services in addition to other types of motor vehicle operations for many years before the enactment of part II being rendered unable to perform any terminal area services itself, all without any specific mention of this drastic result by the Congress."

In the first quoted passage in the paragraph immediately preceding, the majority apparently is speaking of the intent of Congress concerning the enactment either of part II or of the Transportation Act of 1940, the latter being legislation which followed the passage of part II in 1935. If the reference is to the enactment of part II, the majority fails to explain why Congress should have had an understanding different from the finding of the Commission in *American Highway Frt. Assn., Inc.*, v. *Ry. Exp. Agency, Inc.*, 201 I.C.C. 755, 759 (1934), " * * * that the express business which is subject to our jurisdiction is that which is handled over railroads, or partly by railroad and partly by water within the conditions stated in the act." Moreover, if the reference is to the intent of Congress relative to the Transportation Act of 1940, the majority then fails to explain why Congress should have viewed the law any differently from that of

the Commission in *Railway Exp. Agency, Inc., Determination of Status*, 121 M.C.C. 161, (1939). The ultimate findings in that case at 189-190 are as follows:

(1) That motor vehicle operations in interstate or foreign commerce by or in behalf of the Agency or any of its subsidiaries in pickup or delivery or transfer service within terminal areas, which operations are associated with prior or subsequent express service by railroad or partly by railroad and partly by water and for which no charge is made in addition to that applicable to such prior or subsequent express service, are subject to the provisions of part I of the Interstate Commerce Act, an are not subject to the provisions of part II; and

(2) That motor vehicle operations in interstate or foreign commerce of the Agency or any of its subsidiaries in transportation which is incidental to transportation by aircraft are not subject to the provisions of part II of the Interstate Commerce Act, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation or standards of equipment; and that authority for such operations is not required from us.

(3) That motor vehicle operations in interstate or foreign commerce of the Agency or any of its subsidiaries in the performance for carriers by railroad of pickup and delivery or transfer service within terminal areas are subject to the provisions of part I of the Interstate Commerce Act and are not subject to the provisions of part II; and that authority for such operations is not required from us.

(4) That other motor vehicle operations in interstate or foreign commerce of the Agency or any of its subsidiaries for carriers by railroad, not specified in finding 3, are subject to the provisions of part II of the Interstate Commerce Act; and that authority for such operations is required from us, such authority to go to the carrier by railroad or to the Agency or its subsidiary as the facts may warrant upon the

application of the principles determined in *Dixie Ohio Exp. Co. Common Carrier Application, supra.*

(5) That all other motor vehicle operations in interstate or foreign commerce of the Agency, or any of its subsidiaries, which are not covered by the above findings and which involve transportation not exempt under section 203(b)(8) of part II of the Interstate Commerce Act, are subject to the provisions of said part; and that authority for such operations is required from us.

(6) That where motor carriers in their own right perform service for the Agency or any of its subsidiaries, such motor vehicle operations are not those of the Agency or its subsidiary within the meaning of section 203(a)(14) of part II of the Interstate Commerce Act.

(7) That where motor vehicle operations are performed by use of vehicles belonging to other persons, such operations are those of the Agency or its subsidiary or are those of others, within the meaning of section 203(a)(14) of part II of the Interstate Commerce Act, as the facts in each instance may warrant upon application of the principles determined in *Dixie Ohio Exp. Co. Common Carrier Application, supra.*

Bearing in mind the earlier findings of the Commission in the *Consolidated* case, *supra*, that terminal area operations can be conducted as an incident of line-haul authority granted under part II, there is no basis for believing that Congress disagreed with the findings of the Commission in the *Determinations* case, or that the Transportation Act of 1940 was intended to legislatively reverse that decision.[22] In the same vein, there is no basis for

[22] In two pertinent respects, one extending the part II safety requirements to terminal agents providing services incidental to part I operations, and the other declaring exempt from direct economic regulation the operations of terminal agents of line-haul motor carriers subject to part II, the Transportation Act of 1940 did have an effect on REA.

concluding that the findings in that case disabled REA in the performance of terminal area services. The disablement was in connection with line-haul motor carrier operations for which "grandfather" rights were provided under part II. Absent such operations, any terminal area services necessarily would be in connection with a rail or other nonmotor line-haul movement and thus would not require part II authority under the findings of the *Determinations* case.

The majority finally argues that unless all express terminal area services are subject to part I, REA could not utilize an agent to perform terminal area services. However, this is not true. The provisions of section 202 (c) (1) and (2) provide that:

> (c) Notwithstanding any provisions of this section or of section 203, the provisions of this part, except the provisions of section 204 relative to qualifications and maximum hours of service of employees and safety of operation and equipment, shall not apply—
>
> (1) to transportation by motor vehicle by a carrier by a railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to part I when performed by such carrier by railroad, as transportation subject to part III when performed by such water carrier, and as transportation or service subject to part IV when performed by such freight forwarder;
>
> (2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to this part, a water carrier subject to part II, or a freight forwarder subject to part IV, in the performance within ter-

> minal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.

As can be seen section 202(c)(2) provides a terminal area exemption not only for agents of an express company subject to part I but also for agents of motor carriers subject to part II and, as indicated, REA fits into both categories. In this respect it also should be noted that while section 202(c)(1) and (2) as part of the Transportation Act of 1940, worked a number of changes in the scheme of motor carrier regulation, that also partially codified a series of Commission decisions dealing with pickup and delivery in connection with part I operations.

In *Scott Bros., Inc., Collection and Delivery Service*, 4 M.C.C. 551, a motor vehicle operator engaged in collection and delivery service for railroads was found not to be subject to regulation under part II. In *Jones Contract Carrier Application*, 16 M.C.C. 559, the *Scott* rationale was specifically adopted and it was found that the status of a motor carrier engaged in pickup and delivery service within a municipality for Railway Express is similar to the status of a motor carrier engaged in the same operations in behalf of a railroad "and are not subject to regulation" under part II. Finally, in *Carpenter Common Carrier Application*, 17 M.C.C. 693, again on the basis of the *Scott* case, collection and delivery for a steamship company regulated under part I was found not subject to part II. In none of the foregoing cases was there any suggestion that pickup and delivery operations in connection with line-haul operations by motor vehicle would be governed by part I. Rather the status of such operations were determined by two cases, the *Consolidated* case

which has already been discussed and *Dick's Transfer & Truck Term. Contr. Car. Application*, 20 M.C.C. 785 (1939).

In the last-mentioned case, the terminal area operations of a motor carrier as an agent for line-haul motor carriers, were found to require specific authority under part II. It was this anomalous decision applicable to motor carriers which was, in effect, reversed by section 202(c)(2) of the act. Otherwise, as pertinent to REA as well as rail carriers, the Transportation Act of 1940 wrought no change in the *economic* regulation of *part I* terminal operations of such carriers.

As a final word on the jurisdictional issue, it should be noted that as a result of the wording of section 203(a)(14) of the act, the position of the majority inexorably leads to the further conclusion that none of the terminal area operations of REA are subject to the safety and other regulations which were adopted under section 204 of the act. Clearly, Congress had no such intention and I submit that the terminal operations of REA in connection with intercity motor carrier operations are subject to the same statutory scheme as other motor carriers not only with respect to safety but with respect to economic regulation as well.

EXERCISE OF JURISDICTION

As to whether REA should be excepted from the findings and conclusions in the sixth supplemental report in Ex Parte No. MC-37, *Commercial Zones and Terminal Areas* as found by the majority, it initially should be noted that the only respondents named herein are REA "and any other express company, or other express companies subject to part I of the act." The practical effect of this is to exclude from consideration the operations of a sizeable number of general and specialized commodity carriers which conduct express or equivalent operations solely under part II.

A further practical effect is that among carriers of express traffic only "express companies" (meaning REA) is given the freedom to vary its terminal areas as it suits its own convenience.

In that regard, it should be noted that since the inception of motor carrier regulation the Commission has been required to struggle against the efforts of carriers to pick and choose the traffic which they will transport. The problem is not one that results from regulation but, as much as anything, explains the reason for regulation. The practices of the carriers range from embargoes against small shipments to the cancellation of joint rates, failure to comply with tariff published rates and routes and tardy transportation of particular traffic. In my opinion the report of the majority will encourage an expansion of such practices.

Important as the foregoing matters are, there are additional basic considerations involved herein.

REA, as a rail-owned instrumentality, must show the existence of special circumstances before it may be granted motor carrier authority which is functionally unrelated to rail operations. See *Railway Exp. Agency, Inc. Extension—Nashua, N. H.*, 91 M.C.C. 311, 339-340, affirmed *Auclair Trans., Inc.*, v. *United States*, 221 F. Supp. 328, 376 U.S. 514. The *Nashua* and *Auclair* decisions make it clear that findings of special circumstances must relate to specific situations and can not be generally assumed. Additionally, there is no question that insofar as ordinary motor carriers are concerned, interstate service to points extending out as far as 50 miles beyond the MC-37 commercial zone limits such as is offered by REA is a line-haul rather than a terminal area service. Compare *Zantop Air Transport, Inc.—Investigation of Operations*, 96 M.C.C. 18, remanded 250 F. Supp. 623; 102 M.C.C. 457, affirmed Civil Action 29662, United States District Court, eastern district of Michigan, southern division, decided July 31, 1967. Accordingly, while it is most cer-

tain that REA need not establish special circumstances in order to provide terminal service, it is equally certain that REA has the burden of justifying the expansion of its terminal areas beyond those established for other motor carriers. Obviously, if certificated motor carrier operations by REA require proof of special circumstances, REA cannot generally rid itself of the need for such proof through the device of expanding its terminal areas without first establishing a compelling basis for treatment different from that accorded to other motor carriers with respect to terminal areas.

In the foregoing respect I believe REA has failed, and also that the majority has improperly placed the burden upon the competitors of REA to establish "compelling circumstances" as to why REA should receive equal treatment with other motor carriers. The majority casts REA in the role of user of underlying modes of transportation and while this is a substantial role in the case of the use of the services of its railroad parents, it is an insignificant one when it comes to the use of independent motor carriers. Rather REA operates its own motor vehicles and provides motor service between more points than any other carrier. Additionally, in this regard, REA offers not only its so-called premium or class rated express service between points within its systems, it also offers a substantial amount of reduced rate service on a selected basis at selected origins and, to some extent, at selected destinations. It thus is able to pick the traffic it transports and the points it serves while, at the same time, competing to a significant extent with motor carriers generally.

REA introduced proof that its terminal area services extend beyond the MC-37 terminal area limits at 750 of its offices, and that a total of 2,771 points having a total population of 16 million, lie beyond the MC-37 areas. However, REA fails to show the extent to which it can not serve those points under its existing line-haul au-

thority, although as admitted by REA, it holds authority to serve a substantial number of such points. Moreover, the evidence submitted by REA relates to its holding out, not its actual service. REA, therefore, has failed to show the extent to which its services might be affected if its terminal areas are controlled by MC-37 zones.

REA finally argues that adherence to MC-37 terminal areas would be inimical to its program of consolidating and reducing the number of its offices. However, REA has never had any difficulty in obtaining appropriate motor carrier authority in circumstances where other carriers are either unable or unwilling to provide express service and it appears that REA is raising a spector that does not exist.

Thus, contrary to the finding of the majority, the demonstrated threat herein is not that the public will be deprived of service, but that REA is exercising an unfair advantage over its competitors. In looking to the future, it must be recognized that REA is changing, if not already, into a nationwide motor carrier. The touchstone of the national transportation policy contains a large element of fairness as well as promotion. While there may be some short-term advantage in promoting the ability of REA to choose the points at which it will provide service, I believe that in the long run the public interest would be served better by calling a halt to the avoidance by REA of the MC-37 findings. If time is required for REA to make the necessary adjustments such can, in my opinion, be given. However, the goal of fair and even regulation requires us to continue in the direction of reciprocal ground rules for competing modes. (Compare *Substituted Service—Piggyback*, 322 I.C.C. 301) and I, therefore, dissent from the findings of the majority.

COMMISSIONER WALRATH, dissenting:

The dissenting expressions of Brothers Murphy and Bush detail some valid and convincing reasons for differing with the report of the majority. While little need be added thereto, I would like to emphasize my own particular concern.

In apparent realization of the nagging lack of a meaningful definition of express service by which to gauge the operations of REA, the report glides around that issue by flatly concluding REA is operating as an express company. For my part, I doubt that REA can now be so considered in a large part of its overall operations. Over the past decade REA's efforts have been directed toward attracting large shipments at volume rates. These efforts, no doubt, have been spurred by a new management perspective. Decisions of this nature surely are in the proper province of management, and may well be in the best interest of REA. At the same time it is to ignore reality not to realize the changes in REA's service which have evolved during these years.

Today, REA is an active competitor for available traffic, especially large or aggregated shipments. Indeed, its service and rates have been, and are being, revamped to attract traffic customarily hauled by general commodity motor carriers or freight forwarders. Plainly, REA has, in part by choice and in part by circumstances, been led more and more to operate as a motor common carrier, in contradistinction to its original role as an express company. To my mind, the mandate of the national transportation policy "* * * to provide for fair and impartial regulation of all modes of transportation * * *" dictates that REA should, therefore, be governed as a motor common carrier.

There is simply no reason to allow REA to expand its operating areas beyond those described in MC-37 when and as it sees fit, by tariff publication on 1 day's notice,

while the motor carriers whose traffic it seeks to divert must prove that public convenience and necessity requires an extension of their authority to do the same thing. I dissent.

COMMISSIONER BUSH, dissenting:

Although express companies are exempt, in part, from our regulation in the performance of pickup and delivery service by motor vehicles under part I of the Interstate Commerce Act, any provision for such service in conjunction with line-haul movement by motor carrier is subject to regulation under part II of the act, as is the case of any other regulated motor carrier within our jurisdiction. Assuming *arguendo* the service involved herein is transfer, collection or delivery service "incidental to" line-haul transportation by *motor carrier*, the exemptions found in section 202(c)(1) of the act do not apply, since it is not:

> * * * transportation by motor vehicle by a carrier by railroad subject to part I, or by a water carrier subject to part III, or by a freight forwarder subject to part IV, incidental to transportation or service subject to such parts, in the performance within terminal areas of transfer, collection, or delivery services, * * *.

Of particular significance are the provisions of section 202(c)(2) whereby part II of the act shall not apply:

> * * * to transportation by motor vehicle by any person * * * for a common carrier by railroad subject to part I, an express company subject to part I, a motor carrier subject to this part, a water carrier subject to part III, or a freight forwarder subject to part IV, in the performance within terminal areas of transfer, collection, or delivery service; *but such transportation shall be considered to be performed*

by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water or the freight forwarder transportation or service, to which such services are incidental. [Emphasis added.]

It is thus apparent from the aforesaid statutory provision that where an express company possesses certificated motor carrier authority to perform line-haul service, all transfer, collection, or delivery service within terminal areas "shall be regulated in the same manner as transportation" to which it is incidental, namely: line-haul motor carrier certificated service. This determination is not nullified by the exception in section 203(a)(14), since by enactment of part II of the act regulating operations by motor carriers the term "express company" referred to in part I is limited to cover only those activities of express companies involving transportation by rail and does not include motor vehicle transportation expressly covered by part II. Furthermore, the mere possession of certificates of public convenience and necessity for operation as a motor carrier within the purview of part II of the act by an express company renders the owner thereof a common carrier by motor vehicle even without the performance of any transportation whatsoever. Here, the testimony of witnesses for REA is that not one of over 2,000 certificates of public convenience and necessity which it holds has ever contained keypoint restrictions. It cannot thus be inferred that REA was performing an act unauthorized in law by applying for requisite motor carrier operating authority pursuant to the provisions of part II of the act, nor that the Commission was unlawfully processing such applications and issuing certificates of public convenience and necessity which were null and void *ab initio*. Such is recognized by the majority in finding that express companies:

> * * * remain subject at all times to the requirements of part II of the act and our rules and regulations

thereunder in all other respects so far as their motor operations and particularly their line-haul motor movements are concerned.

Yet, performance within terminal areas of transfer, collection or delivery service incident to motor carrier line-haul service is found exempt and will not be regulated, which is expressly contrary to the provisions of section 202(c)(2).

Notwithstanding the foregoing assumption, the evidence of record is that express service is afforded shipments continuously moving to points beyond commercial zones as far distant as 50 miles or more in line-haul motor carrier movement. Such continuity of movement until delivery is made is, in my view, line-haul service for which operating authority is required under part II of the act. The removal of express companies from the determination made with respect to the scope of terminal areas or commercial zones in the *Commercial Zones and Terminal Areas* case, 54 M.C.C. 21, confers *carte blanche* authority upon such carriers to be self-adjudicators, and resolution of the nature of the operations should not be left subject to subsequent review by the Commission on our own motion or by way of complaint.

While it is determined that materiality of rates in effect, and those to be published, is of little or no consequence in this proceeding, I am of the view that such are relevant and material. Admittedly, REA has and will continue to publish rates subject to a tender of 15,000, 20,000, 30,000, et cetera, of aggregate shipments from one shipper at one time. The service is tantamount to that of a motor common carrier of general freight, specializing in the handling of less-than-truckload quantities, or truckload quantities with higher minimum weights; or an actual "incursion" by railroads into motor common carrier operations through REA on a national scale. Under such circumstances, consideration of the effect of the establishment of such volume rates by REA

upon existing motor common carriers and the interests of the public under the national transportation policy must be given. *Saginaw Transfer Co., et al.* v. *United States et al.*, Civil Action No. 2748, United States District Court, eastern district of Michigan, northern division (November 8, 1967). In these respects, the decision by the majority is legally deficient.

For the reasons set forth herein and those in my dissenting expression in *Railway Exp. Agency, Inc., Ext.—Rochester-Albany, N. Y.*, 98 M.C.C. 341, 348, I would therefore find that the terminal areas and commercial zones of express companies *are* subject to the determinations made with regard to the scope of terminal areas of motor carriers and freight forwarders in *Commercial Zones and Terminal Areas, supra.*

CHAIRMAN TUCKER and COMMISSIONERS SYPHERS and HARDIN did not participate.

ORDER

At a General Session of the INTERSTATE COMMERCE COMMISSION, held at its office in Washington, D. C., on the 5th day of December 1967.

EX PARTE NO. 242

EXPRESS COMPANY TERMINAL AREAS

It appearing, That the Commission, by notice and order entered March 19, 1964, instituted the above-entitled proceeding under parts I and II of the Interstate Commerce Act and section 4 of the Administrative Procedure Act for the purpose of inquiring into the legal and operational practices, and the manner and methods of operation associated with transportation by motor vehicle, in interstate or foreign commerce, in the performance of transfer, collection, delivery, and all similar and related types of services and practices, within what are described or otherwise known as terminal, pickup, or delivery areas of, or for, express companies under part I or part II of the act, with a view to prescribing such rules and regulations as may be appropriate, or taking such other action as may be necessary or desirable in the light of the national transportation policy and the purposes of the Interstate Commerce Act as a whole, to resolve and define the operational practices, scope, and legal principles which do or should obtain in the performance of the terminal area services and related activities described;

It further appearing, That the said notice and order entered March 19, 1964, invited the participation of all interested parties to submit representations and participate and that notice to all interested parties was given through publication of the said notice in the Federal Register of April 18, 1964;

It further appearing, That the National Small Shipments Traffic Conference, Inc., Drug and Toilet Preparation Traffic Conference, and the Eastern Industrial Traffic League, Inc., have filed a motion to strike certain portions of the joint reply of the motor carrier interveners;

And it further appearing, That investigation of the matters and things involved in this proceeding having been made, and the Commission, on the date hereof, having made and filed its report on oral argument herein setting forth its conclusions and findings and reasons therefor, which report is hereby referred to and made a part hereof:

It is ordered, That the motion described in the third appearing paragraph hereof, be, and it is hereby, denied for the reasons set forth in the said report.

It is further ordered, That this proceeding be, and it is hereby, discontinued.

By the Commission.

H. NEIL GARSON,

(SEAL) Secretary.

APPENDIX D

STATUTES INVOLVED

NATIONAL TRANSPORTATION POLICY

[*September 18, 1940.*] [*49 U.S.C., preceding §§ 1, 301, 901, and 1001.*] It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

APPLICATION OF PROVISIONS

Sec. 202 [August 9, 1935, amended September 18, 1940, May 16, 1942, September 6, 1965.] [49 U.S.C. § 302.]

* * * *

(c) Notwithstanding any provision of this section or of section 303 of this title, the provisions of this chapter, except the provisions of section 304 of this title relative to qualifications and maximum hours of service of em-

ployees and safety of operation and equipment, shall not apply—

(1) to transportation by motor vehicle by a carrier by railroad subject to chapter 1 of this title, or by a water carrier subject to chapter 12 of this title, or by a freight forwarder subject to chapter 13 of this title, incidental to transportation or service subject to such chapters, in the performance within terminal areas of transfer, collection, or delivery services; but such transportation shall be considered to be and shall be regulated as transportation subject to chapter 1 of this title when performed by such carrier by railroad, as transportation subject to chapter 12 of this title, when performed by such water carrier, and as transportation or service subject to chapter 13 of this title when performed by such freight forwarder;

(2) to transportation by motor vehicle by any person (whether as agent or under a contractual arrangement) for a common carrier by railroad subject to chapter 1 of this title, an express company subject to chapter 1 of this title, a motor carrier subject to this chapter, a water-carrier subject to chapter 12 of this title, or a freight forwarder subject to chapter 13 of this title, in the performance within terminal areas of transfer, collection, or delivery service; but such transportation shall be considered to be performed by such carrier, express company, or freight forwarder as part of, and shall be regulated in the same manner as, the transportation by railroad, express, motor vehicle, or water, or the freight forwarder transportation or service, to which such services are incidental.

DEFINITIONS AND EXCEPTIONS — DEFINITIONS

Sec. 203 [August 9, 1935, amended June 23, 1938, June 29, 1938, September 18, 1940, September 1, 1950, July 9, 1952, July 22, 1954, August 3, 1956, August 22, 1957, August 12, 1958, July 12, 1960, December 17, 1963, July 26, 1968.] [49 U.S.C. § 303.]

(a) As used in this chapter—

* * * *

(9) The term "express company" means any common carrier by express subject to the provisions of chapter 1 of this title.

* * * *

(14) The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to chapter 1 of this title, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to chapter 1 of this title.

APPLICATION FOR CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Sec. 206. [August 9, 1935, amended June 29, 1938, September 18, 1940, September 1, 1950, July 12, 1960, October 15, 1962.] [49 U.S.C. § 306.]

(a)(1) Except as otherwise provided in this section and in section 310a of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operations on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: *Provided, however,* That, subject to section 310 of this title, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time,

or if engaged in furnishing seasonal service only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instances as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate was made to the Commission as provided in subsection (b) of this section and within one hundred and twenty days after October 1, 1935, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operations to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 307 (a) of this title and such certificate shall be issued or denied accordingly. Pending the determination of any such application the continuance of such operation shall be lawful.

ISSUANCE OF CERTIFICATE

Sec. 207. [August 9, 1935.] [49 U.S.C. § 307.] (a) Subject to section 210, a certificate shall be issued to any qualified applicant therefor, authorizing the whole or any part of the operations covered by the application, if it is found that the applicant is fit, willing, and able properly to perform the service proposed and to conform to the provisions of this part and the requirements, rules, and regulations of the Commission thereunder, and that the proposed service, to the extent to be authorized by the certificate, is or will be required by the present or future public convenience and necessity; otherwise such application shall be denied: *Provided, however*, That no such certificate shall be issued to any common carrier of

passengers by motor vehicle for operations over other than a regular route or routes, and between fixed termini, except as such carriers may be authorized to engage in special or charter operations.

TERMS AND CONDITIONS OR CERTIFICATE

Sec. 208. [August 9, 1935, November 10, 1966.] [49 U.S.C. § 308.] (a) Any certificate issued under section 206 or 207 shall specify the service to be rendered and the routes over which, the fixed termini, if any, between which, and the intermediate and off-route points, if any, at which, and in case of operations not over specified routes or between fixed termini, the territory within which, the motor carrier is authorized to operate; and there shall, at the time of issuance and from time to time thereafter, be attached to the exercise of the privileges granted by the certificate such reasonable terms, conditions, and limitations as the public convenience and necessity may from time to time require, including terms, conditions, and limitations as to the extension of the route or routes of the carrier, and such terms and conditions as are necessary to carry out, with respect to the operations of the carrier, the requirements established by the Commission under section 204(a)(1) and (6): *Provided; however*, That no terms, conditions, or limitations shall restrict the right of the carrier to add to his or its equipment and facilities over the routes, between the termini, or within the territory specified in the certificate, as the development of the business and the demands of the public shall require.

APPENDIX E

SUPREME COURT OF THE UNITED STATES

No. ——, October Term, 1969

NORTHERN FREIGHT LINES, INC., ET AL.,
Appellants,

v.

UNITED STATES, ET AL.

ORDER

UPON CONSIDERATION OF the application of appellants,

IT IS ORDERED that the time for docketing an appeal under Rule 13 in the above-entitled cause be, and the same is hereby, extended to and including December 22, 1969.

HUGO L. BLACK
Associate Justice of the
Supreme Court of the
United States

Dated this 28th
day of November, 1969.

APPENDIX F

SUPREME COURT OF THE UNITED STATES

No. ———, October Term, 1969

NORTHERN FREIGHT LINES, INC., ET AL.,
Appellants,

vs.

UNITED STATES, ET AL.

ORDER

UPON CONSIDERATION of the further application of counsel for the appellants,

IT IS ORDERED that the time for docketing an appeal under Rule 13 in the above-entitled cause be, and the same is hereby, further extended to and including January 30, 1970.

/s/ W.E.B.
Chief Justice
of the United States

Dated this 19
day of December, 1969.

APPENDIX G

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

Civil Action No. 12699

[Filed in Clerk's Office, Jan. 12, 1970,
Claude L. Goza, Clerk, By: /s/ [Illegible], Deputy Clerk.]

NORTHERN FREIGHT LINES, INC., ET AL.

vs.

UNITED STATES OF AMERICA, ET AL.

ORDER

Upon consideration of the motion of plaintiffs to vacate the judgment of this Court of September 16, 1969, and the briefs filed in connection therewith, said motion is hereby OVERRULED and DENIED.

This 8th day of January, 1970.

/s/ Griffin B. Bell N.E.
GRIFFIN B. BELL
United States Circuit Judge

/s/ Frank A. Hooper
FRANK A. HOOPER
United States Senior District Judge

/s/ Newell Edenfield
NEWELL EDENFIELD
United States District Judge

SUPREME COURT, U. S.

FEB 20 1970

JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1100

NORTHERN FREIGHT LINES, INC., ET AL., *Appellants*,

v.

UNITED STATES OF AMERICA, ET AL., *Appellees*.

On Appeal from the United States District Court for the Northern District of Georgia, Atlanta Division

---

MOTION TO AFFIRM

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

IN THE

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MOTION TO AFFIRM

Appellees, the Drug and Toilet Preparation Traffic Conference, The National Small Shipments Traffic Conference, Inc., Eastern Industrial Traffic League, American Home Products Corporation, the Norwich Phar-

macal Company, and Sterling Drug, Inc. move pursuant to Rule 16(1)(c) of the Rules of this Court to affirm the judgment of the District Court.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court (J.S. 1a-18a, reported at 304 F. Supp. 536) dismissing appellants' suit to review a report and order of the Interstate Commerce Commission in a rule-making proceeding. The Commission decided to continue its flexible method of setting terminal areas for express companies.

The facts of the case are simple. Express companies have always set their own terminal areas by tariff publication (J.S. 28a, 29a, 31a). Thousands of points having a total population in the millions are included in REA's present terminal areas but lie beyond the motor carrier MC-37 areas (J.S. 31a). Many shippers and their customers either ship or receive a significant volume of express shipments from or to points beyond the motor carrier MC-37 terminal areas (J.S. 32a-33a).

The Commission found that application of the MC-37 zones would make express service unresponsive to the demonstrated need of the shipping public, that the express terminal areas should be sufficiently extensive to serve the needs of the public, and that they should be set in the same manner as heretofore, subject to Commission review under Part I of the Interstate Commerce Act (J.S. 43a).

The court below held that the Interstate Commerce Commission had a rational basis for its decision.

ARGUMENT

There is abundant support for the court's decision and for that of the Commission. As noted by the court below, the I.C.C. maintained the status quo and concluded that REA should continue to set its terminal areas by tariff publication. The Commission recognized the adverse impact on shippers that would flow from restricting REA's terminal area operations as appellants urged:

> "Thus faced with the reality of some 16 million people together with numerous industrial, retail, and military facilities being deprived of express service they presently receive and depend upon and at the same time being fully cognizant of our responsibilities under the act and the national transportation policy, we recognize that adequate provision for the continuation of this service must be made." (J.S. 40a).

The court reviewed in specific detail the record evidence of shipper dependence upon REA service (J.S. 11a), and concluded that the I.C.C. "has protected the shipping public". (J.S. 11a)

In deciding to maintain flexibility in express company terminal areas the Commission carefully considered the evidence in the record, the effect of maintaining the status quo and the appropriate statutory criteria, including the national transportation policy. The court below properly found that the Commission's decision was rationally based.

The Commission's decision here changed nothing. As the Commission and the court each noted (J.S. 54a-55a and 16a respectively), REA's terminal areas have

been and are subject to investigation, suspension, and complaint proceedings. Appellants are free so to proceed.

CONCLUSION

Since this appeal presents no issue warranting plenary consideration, the judgment of the court below should be affirmed.

Respectfully submitted,

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MOTION TO AFFIRM

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PRESS OF BYRON S. ADAMS PRINTING, INC., WASHINGTON, D. C.

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MOTION TO AFFIRM

Appellee, Railway Express Agency, Incorporated (REA), Intervenor Defendant in the proceeding below, moves pursuant to Rule 16(1)(c) of the Rules of this Court to affirm the judgment of the District Court.

STATEMENT

This is a direct appeal from the final judgment of a three-judge District Court (J.S. App. B, reported at 304 F. Supp. 536) dismissing an action brought by appellants to set aside a report and order issued by the Interstate Commerce Commission (J.S. App. C) in a rulemaking proceeding. The Commission declined to adopt the rules urged by appellants and chose, instead, to retain its long-standing policy of permitting express companies flexibility in setting terminal areas by tariff publication.

In compliance with directions of the Commission,[1] REA has since 1913 published I.C.C. Tariff A-3, the Joint Directory of Express Stations, which indicates the type of service available at the various offices, and I.C.C. Tariff A-4 which defines express pickup and delivery limits at each office where such service is provided. Thus, over the years, REA and other express companies established and, as conditions warranted, altered the geographic limits of the terminal areas of their offices through tariff publication, subject at all times to review and modification by the Commission. For motor common carriers, on the other hand, the geographic limits of terminal area operations are set under criteria established by the Commission, pursuant to authority in Part II of the Interstate Commerce Act,[2] in Ex Parte No. MC-37, *Commercial Zones and Terminal Areas*, 54 M.C.C. 21 (1952).

Express companies have historically provided an integrated multi-modal small shipments transportation

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[1] *In Re Express Rates, Practices, Accounts, and Revenues*, 24 I.C.C. 390, 394 (1912); 28 I.C.C. 131 (1913).

[2] 49 U.S.C. § 301, *et seq.*

service, utilizing the most efficient mode of transport—rail, motor, water and air—in their inter-terminal ("line-haul") movements. Pick-up and delivery in terminal areas has always been an element of express service. Prior to passage of the Motor Carrier Act of 1935, the activities of express companies, including their terminal area operations, were regulated exclusively under Part I of the Act. After enactment of the Motor Carrier Act, the Commission ruled that express companies were required to proceed under Part II of the Act to obtain authority for their line-haul motor vehicle operations. *Railway Express Agency, Inc., Determination of Status*, 21 M.C.C. 161 (1939).

In *Railway Express Agency, Inc., Extension—Nashua, N.H.*, 91 M.C.C. 311 (1962), *aff'd, Auclair Transp., Inc.* v. *United States*, 221 F. Supp. 328 (D. Mass. 1963), *aff'd per curiam*, 376 U.S. 514 (1964) the Commission noted that REA's increased reliance on motor transportation for line-haul movements, necessitated by the disappearance of railroad passenger trains, created the possibility that REA might be considered subject to varying terminal area limitations depending upon the mode of line-haul movement used for each shipment. The Commission stated that it did "not view this as a tolerable situation, and we will take the necessary steps to remove this probable uncertainty." *Nashua, supra*, at 338. Accordingly, the ICC on its own motion instituted a rule-making proceeding under 49 U.S.C. §§ 1, 12(1), 302(c)(2), 303(a)(14), 304 and Section 4 of the Administrative Procedure Act, 5 U.S.C. § 533, to inquire into terminal area practices of express companies. A hearing was held in which REA was the only express company participant.

The question addressed by the Commission in the rulemaking proceeding was "whether in the light of the national transportation policy, this formula [the MC-37 criteria] can or should be uniformly applied in the setting of terminal areas for express service." (J.S. 37a). The Commission decided that the MC-37 criteria should not be applied to express service for, in its judgment, to do so "would fail to recognize and adequately preserve a public service having certain unique and important attributes which clearly distinguish it from other forms of transportation." (J.S. 37a-38a). The Commission found that flexibility in the pattern of express company terminal areas is necessary because "express is a unique service and its concomitant, pickup and delivery service, has become even more important as numerous REA offices located in smaller communities are closed for economic and technological reasons and the availability of the express service previously rendered can only be assured by the consolidation of contiguous territory into larger terminal areas with more efficient facilities." (J.S. 40a).

The Commission recognized that there is some competition between the regulated motor carriers and REA, stating that "it cannot be denied that some motor carriers and freight forwarders may be affected by competition from REA generally . . . . " (J.S. 41a).[3] But the existence of some competition between motor carriers and REA did not, in the Commission's judgment, require identical terminal area treatment of the two. Instead, the Commission focused its concern on the fact that "express service has a distinctive character and that we cannot overlook the numerous benefits presently

[3] The Commission referred elsewhere in its report to the evidence of competition. See J.S. 25a, 34a, and 35a.

made available to the public which are generally unavailable from other types of carriers." (J.S. 38a). The Commission concluded that "in the absence of any substantial showing that the public interest would best be served by confining pickup and delivery to the more limited MC-37 terminal areas, we must proceed upon the policy of recognizing and encouraging express operations as one of the most practicable available means towards coordinating the various modes of transportation. . . ." (J.S. 41a).

In concluding that terminal areas for express carriers should continue to be set by tariff publication, the Commission cautioned that "such terminal areas are subject, however, to our review in the manner in which this has previously been accomplished under part I of the act" (J.S. 43a) and pointed out that tariffs relating to terminal areas are subject to investigation, suspension, and complaint proceedings. (J.S. 44a).

Applying the limited scope of review appropriate to agency rulemaking, in which the decision should be affirmed unless the ICC "acted in an arbitrary and capricious manner, in abuse of its discretion or otherwise out of accordance with the law . . ." (J.S. 9a), the three-judge court below unanimously upheld the Commission's Report and Order. The court held that "the ICC had a rational basis upon which to conclude that REA offered distinctive service meriting different terminal area treatment, than that received by ordinary motor carriers." (J.S. 17a).

ARGUMENT

I

The thrust of appellants' challenge to the Commission's decision has been directed to the wisdom of the policy adopted by the Commission in a rulemaking proceeding. Appellants thus would have the courts step outside their proper role in reviewing agency rulemaking, as recently restated by this Court:

> "It is not our duty, of course, to concern ourselves with a nice evaluation of the arguments as to whether the Commission pursued the course of wisdom. . . . It is our task to scrutinize the Commission's authority, not the substance of its exercise." *American Trucking Ass'ns, Inc.* v. *A.T. & S.F. Ry.*, 387 U.S. 397, 412 (1967).

Similarly, while both the Commission and the District Court underscored the ample record evidence distinguishing REA's service from that of motor common carriers, the "substantial evidence" test is inapplicable to this review of agency rulemaking. See, e.g., *Bridgeport Fed. Sav. & Loan Ass'n* v. *Fed. Home Loan Bank Bd.*, 199 F. Supp. 410 (E.D. Pa. 1961), *aff'd*, 307 F. 2d 580 (3d Cir. 1962), *cert. denied*, 371 U.S. 950 (1963); *Tidewater Express Lines, Inc.* v. *United States*, 281 F. Supp. 995 (D. Md. 1968). Viewed in this context, it is manifest that the questions presented by appellants are so unsubstantial as not to need further argument.

II

Appellants' principal contention in this Court is that the Commission "declined to consider" evidence of

competition between REA and regulated motor carriers. (J.S. 10-11). This assertion is not supported by the facts. Indeed, the Commission stated in its report that "it cannot be denied that some motor carriers and freight forwarders may be affected by competition generally. . . ." (J.S. 41a).

Further, the District Court, after reviewing the same contention, properly rejected appellants' claim, pointing out that the ICC *did* recognize that an area of competition exists between REA and motor carriers. (J.S. 14a). The court found that the Commission "did not act arbitrarily in recognizing that competition was not necessarily the crucial factor in defining the terminal areas for REA." (*Id.*). Rather, as the court held after carefully reviewing the evidence in the record (J.S. 10a-12a), "whatever the competition involved, the ICC correctly found that REA performed a distinctive service unmatched by other carriers." (J.S. 14a).

III

Appellants claim that the conclusion that REA's express service is different from motor carrier service rests only on an "assumption" by the Commission, and that the Commission declined "to consider the question of the nature of REA express service and its relation to the ordinary freight service of motor carriers. . . ." (J.S. 9).

This, again, is not supported by the record. The Commission had before it evidence in the record showing, as the court below stated, "that REA performed a

distinctive service unmatched by other carriers" [4] (J.S. 14a) and found the public interest best served by continuing a terminal area policy designed to permit REA sufficient flexibility to serve the needs of the public. Stating that "the record is replete with evidence of shipper dependence on REA service," [5] the District Court referred to record evidence of some of the factors, in addition to REA's emphasis on small parcel traffic (J.S. 10a), on which "this public dependence is based." (J.S. 11a).

Emphasizing that the appellants "adduced no evidence that they are willing and able on a regular basis to provide comparable service" (J.S. 11a-12a), the court held that "by recognizing the unique service REA continues to make available the ICC has protected the shipping public." (J.S. 11a).

IV

Appellants argue that the Commission and the District Court erred in finding that a policy of flexible terminal areas for express companies is consistent with the National Transportation Policy. (J.S. 13). In essence, appellants' argument is that the Commission's decision runs afoul of the National Transportation

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[4] In fact, some of these appellants argued in *Denver & R.G.W.R.R.* v. *United States*, 387 U.S. 485 (1967) that the Interstate Commerce Commission "has consistently recognized certain fundamental differences between express service and ordinary freight service." Brief to the Supreme Court on behalf of the American Trucking Associations and other motor carrier interests at p. 23.

[5] Numerous shippers and shipper organizations supported REA in the proceeding before the Commission and each urged that the Commission maintain its flexible terminal area policies for express.

Policy because it tends to weaken the motor carriers' ability to compete with REA.

In fact, however, the motor carriers do not wish to compete but to avoid competition. As the District Court and the ICC both pointed out, the motor carriers "do not seek to expand their terminal area limits but to reduce REA's zones." (J.S. 15a-16a).

In any event, the National Transportation Policy does not demand that the ICC treat all modes and all carriers alike in all circumstances. The District Court examined and affirmed the Commission's decision in light of the tenets of the National Transportation Policy. In the court's view the Commission's decision acted to protect "the shipping public, dependent on REA for the expeditious handling of small, often special, parcels . . . " and that "the National Transportation Policy is preserved by protection of the public." (J.S. 15a). The court found that the ICC recognized the "inherent advantages" of express service in deciding to treat express terminal areas differently from motor carrier terminal areas. *Id.* Moreover, the court concluded that the appellants "are not left unprotected by the ICC's ruling nor are they put at an unfair advantage." (J.S. 16a). Thus, appellants' contention that the Commission or the court refused to weigh the "competitive consequences" of the Commission's action (J.S. 15) is not supported by the record.

Appellants' argument that the Commission erred because its decision results in "railroad incursions into the field of motor carrier service" (J.S. 16) is unfounded. First, as the District Court was advised before oral argument by REA and the United States

in their briefs, REA's railroad shareholders had formally accepted an offer to sell their interest in REA to a group of purchasers unrelated to the railroads and the sale has been consummated. Moreover, there is no "incursion" into motor carriage; the Commission's continuation of its long-standing, flexible terminal area policy does not grant to REA any new authority to conduct motor carrier service.

V

After arguing that the ICC erred *because* REA was railroad owned, appellants also contend that the District Court erred in refusing to vacate its judgment herein on the ground that REA is *no longer* railroad owned. (J.S. 17). Apart from the apparent inconsistency of appellants' assertions, their effort to invoke Fed. R. Civ. P. 60 (b) in the District Court was properly denied, particularly in light of the fact that the change in ownership was brought to appellants' and the District Court's attention in REA's brief and in the Government's brief *before oral argument.*[6] Because they were arguing the contrary proposition, appellants did not raise the change of ownership point until many weeks had passed after the District Court's decision was rendered. In any event, REA's ownership —whether rail-owned or not rail-owned—was immaterial to the decisions of the District Court and the Commission. Appellants' reference to the Commission's use of the word "significant" (J.S. 15) in de-

[6] The court's opinion noted that the United States had referred to the change of ownership in its brief (J.S. 2a, n.2) in which it cited articles in the *Wall Street Journal* dated July 9 and 10, 1969. The oral argument before the court was on *July 22, 1969.* Although appellants clearly had notice of the change of ownership in advance, they chose not to mention it during the argument.

scribing REA's ownership by the railroads is clearly wrenched out of context. Nowhere in the Commission's or the court's decision is their anything suggesting any substantive importance in REA's ownership and the entire rationale of the ICC's decision is unrelated to REA's ownership status.

CONCLUSION

The judgment of the court below should be affirmed.

Respectfully submitted,

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UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO AFFIRM

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

MOTION TO AFFIRM

Pursuant to Rule 16(1)(c) of the Rules of this Court, the United States and the Interstate Commerce Commission move that the judgment of the district court be affirmed.

STATEMENT

This is a direct appeal from the final judgment of a three-judge district court (J.S. 1a–18a; 304 F. Supp. 536) dismissing an action brought to set aside a report and order of the Interstate Commerce Commission (J.S. 19a–72a; 332 ICC 91). In the decision under review the Commission determined that trucks of the Railway Express Agency, Inc. (REA) engaged in

pickup and delivery services should not be restricted to the terminal areas that apply generally to such services by motor common carriers of freight. See *Commercial Zones and Terminal Areas,* 54 M.C.C. 21.

REA is an express company subject to regulation as such under Section 1(3)(a) of the Interstate Commerce Act (49 U.S.C. 1(3)(a)). In this specialized capacity, REA uses every available mode of carriage, including its own trucks, to perform its inter-community or line-haul transportation (J.S. 28a, 31a, 38a–39a). Before it may operate its trucks in line-haul transportation, REA is required to obtain motor certificates from the Commission (*REA, Determination of Status,* 21 M.C.C. 161, 183, 186–188, 190); however, the certificates issued to REA are unlike the licenses granted to general motor freight carriers, as evidenced by the conditions contained therein recognizing REA's motor operations to be merely an integral part of its whole express service.[1]

In 1964 the Commission on its own motion instituted a rule-making proceeding, and conducted hearings, to consider whether REA, as a consequence of operating its own trucks in its line-haul transportation, should be held to the terminal area limits applicable to

[1] For example, REA's motor certificates contain restrictions limiting its motor authority to that which is auxiliary to or supplemental of its express service, and the shipments which it transports must be limited to those moving on a through bill of lading or express receipts. See, *e.g., Auclair Transportation, Inc.* v. *United States,* 221 F. Supp. 328, 330–331 (D. Mass.), affirmed, 376 U.S. 514).

interstate motor freight carriers.[2] The motor carriers and certain freight forwarders[3] (J.S. 22a, ns. 4–5) urged that REA be treated like nonexpress company motor carriers. But not one shipper participating in the proceeding supported this view. Instead, each one of the many shippers participating, including the Department of Defense and the Department of the Interior (J.S. 21a–22a, n. 3), declared its need for REA's specialized service as an express company, and voiced its concern that such service could be materially impaired if REA were restricted to the terminal area limits of the truckers.

The hearing examiner concluded that REA should be so restricted, but upon review the entire Commission,[4] with three dissents, reversed (J.S. 19a–72a). The Commission reasoned that REA's line-haul operations are not confined to one particular mode of carriage, but that instead, through its use of all available modes, those operations are diverse in character (J.S. 38a). Consequently, the flexibility inherent in REA's service could be improperly impeded if its pickup and delivery services were restricted to the conventional terminal areas when it uses its own trucks in its line-haul opera-

[2] See *REA Extension—Nashua, N.H.*, 91 M.C.C. 311, 322, 338, affirmed on other grounds, *Auclair Transportation, Inc.* v. *United States*, *supra*.

[3] Freight forwarders regulated by the Commission under Part IV of the Interstate Commerce Act (49 U.S.C. 1001–1022) are also subject to the terminal area restrictions applicable to motor freight carriers (see 54 M.C.C. 21, 67–74).

[4] Five Commissioners constituted the majority, with three determining not to participate (J.S. 70a).

tions (J.S. 39a).[5] The Commission further noted that if it imposed upon REA the type of limitation the truckers urged, it would fail in the light of the National Transportation Policy "to recognize and adequately preserve a public service having certain unique and important attributes which clearly distinguish it from other forms of transportation" (J.S. 37a–38a). The Commission observed that this was particularly true when such a substantial segment of the nation's population depended upon that service (J.S. 40a, 43a). Thus, under the Commission's decision, REA remained subject to the special, more liberal terminal area limits that have applied to express companies for 60 years.

The three-judge court below unanimously affirmed (J.S. 1a–18a) the Commission's determination, holding that there was a rational basis for its conclusion that REA offered a distinctive service warranting different terminal area treatment from that received by motor freight carriers (J.S. 17a).[6]

ARGUMENT

1. Appellants' principal contention here (J.S. 6–8, 10–11, 15), as it was below, is that because there is

[5] None of the dissenting Commissioners, it should be noted, expressed the view that REA should be restricted to the truckers' terminal areas when it uses some mode of transportation other than its own trucks for the line-haul movement.

[6] Appellants thereafter filed a motion with the lower court to vacate its final judgment, arguing that certain newspaper articles—all of which had been published and were available to appellants before the court decided the case—contained possible "new" facts warranting reconsideration of the Commission's decision; the court denied appellants' motion (J.S. 80a).

some degree of competition between REA and the truckers, and because REA at times operates its own motor vehicles for its line-haul transportation, REA *ipso facto* is a trucker which must be subjected in all instances to the terminal area restrictions applicable to the truckers. The Commission was fully aware "that some motor carriers and freight forwarders may be affected by competition from REA generally" (J.S. 41a). However, the Commission properly declined, as the lower court held, to give controlling weight to this factor, because it found that in spite of the peripheral competition between REA and the truckers, the REA express service was nevertheless sufficiently distinct from the transportation services provided by truckers to warrant different treatment in fixing terminal areas (J.S. 14a). Moreover, the motor carriers encounter no less competition from the railroads and water carriers than they do from REA. Those carriers may operate their own trucks within their terminal areas in performing pickup and delivery services (see 49 U.S.C. 302(c)(1)). Yet, such rail and water carriers' terminal areas do not, and need not, correspond to those of the truckers because of the essential differences in their services. *Pickup and Delivery Limits at Los Angeles, Calif.*, 299 I.C.C. 347, 352–353; *Newtex S.S. Corp., Collection and Delivery Service*, 273 I.C.C. 304, 308–309.

To contend otherwise and assert that REA is simply a trucker (J.S. 6–8, 10–11, 15), an argument essentially made and rejected in *Estes Express Lines* v. *United States*, 292 F. Supp. 842 (E.D. Va.), affirmed,

394 U.S. 718, and *Auclair Transportation, Inc.* v. *United States*, 221 F. Supp. 328 (D. Mass.), affirmed, 376 U.S. 514, is to disregard completely (1) REA's distinct service that is unmatched by the truckers (J.S. 10a–11a, 32a–33a, 38a); (2) the important differences between the conditions contained in its motor certificates and those found in the licenses of ordinary truckers, recognizing that REA's motor operations are merely an integral part of its whole express service (J.S. 16a)[7]; and (3) its line-haul operations that are not confined to its trucks, but are diverse and multi-modal in nature (J.S. 38a–39a). In essence, the character of REA's service does not change with the mode of carriage employed for its line-haul transportation, but rather remains throughout the movement of an express carrier. Accordingly, REA is no more an ordinary trucker, as the lower court correctly recognized (J.S. 11a–13a), than it is a railroad when it uses passenger trains. *United States* v. *American Railway Express Co.*, 265 U.S. 425, 427, 431–434.

2. The balance of the appellants' contentions are equally without merit. REA's terminal areas are fully subject to Commission jurisdiction (J.S. 44a–45a). The fact that it defines its terminal areas in its tariffs, as it

[7] See note 1, *supra*.

[8] Even if REA were considered a trucker, the Commission found that its terminal areas could still be treated distinctly from those of other truckers (J.S. 45a). The Commission has already allowed independent terminal area treatment for a particular motor carrier where special circumstances warrant it. See *Commercial Zones and Terminal Areas*, *supra*, 54 M.C.C. 21, 58.

traditionally has done for 60 years,[9] does not, as appellants urge, give it an "unfair advantage" (J.S. 12) over other carriers. Many of them, including the railroads and water carriers, also define their terminal areas in an identical manner, and it is manifestly permissible for them to do so. *Los Angeles Switching Case*, 234 U.S. 294, 313; *Newtex S.S. Corp., Collection and Delivery Service*, 273 I.C.C. 304, 309. Contrary to appellants' suggestion, these carriers, including REA, cannot "expand and alter the geographic scope of their [terminal] operations at will" (J.S. 14), since any proposed tariff change of their terminal areas is subject to investigation and suspension by the Commission and may be attacked by the complaint of any party.[10] *American Trucking Ass'ns, Inc.* v. *United States*, 260 F. Supp. 386, 390 (D.D.C.), affirmed, 387 U.S. 93; *Sea-Land Service, Inc.* v. *United States*, 222 F. Supp. 558, 564 (D. Del.) Thus, the Commission has not set any new standards here that have, as appellants assert, "freed REA" (J.S. 16) by allowing it to operate for the first time differently from its past practices. Instead, after taking a fresh look at REA's operations, the Commission has allowed it to remain subject to the same terminal area standards that have traditionally applied to express companies for 60 years.

Appellants' contention (J.S. 13–14) that the Com-

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[9] *In re Express Rates, Practices, Accounts, and Revenues*, 24 I.C.C. 380, 394–395.

[10] See *Barton Truck Line, Inc.* v. *REA*, 95 M.C.C. 625, 628–630; *Collection and Delivery Limits [of REA] at Harrisburg, Pa.*, 281 I.C.C. 379.

mission failed to consider the requirements of the National Transportation Policy is negated on the face of the Commission's report and order (J.S. 37a–38a). The lower court correctly found that the Commission properly weighed and satisfied those guidelines (J.S. 15a–16a), particularly by protecting the shipping public (J.S. 15a) which "cares little about the mode of intercity [transportation] employed" by REA, but rather is "concerned only with the express service REA furnishes" (J.S. 13a).

Lastly, the court below properly denied appellants' motion to vacate its final judgment (J.S. 80a). Appellants' alleged "discovery" of "new" facts concerning the possible change in the ownership or control of REA (J.S. 15) is contradicted on the face of the lower court's opinion (J.S. 2a, n. 2).[11] See *Flett* v. *W. A. Alexander & Co.*, 302 F. 2d 321, 323–324 (C.A. 7), certiorari denied, 371 U.S. 841. Moreover, any change in control would not have altered the conclusion reached by the Commission here, as sustained by the court below, since the Commission's determination was not dependent upon who owned REA.[12] Finally, even if a change in control should cause REA's transportation operations at some later time to be materially

[11] *A fortiori*, the "new" evidence would not have been a proper basis for relief. *Illinois Cent. R.R. Co.* v. *Norfolk & W. Ry. Co.*, 385 U.S. 57, 75; *Interstate Commerce Commission* v. *Jersey City*, 322 U.S. 503.

[12] One of appellants' arguments advanced to the court before it decided the case was that the railroads' ownership of REA was critical (J.S. 16). That argument, correctly rejected by the lower court (J.S. 16a), would be unavailing now if the railroads have sold their stock interest in REA.

altered so that it no longer in fact functions as an express company, adequate administrative remedies remain available to appellants to bring such facts to the Commission's attention (see 49 U.S.C. 13). Thus, the lower court correctly exercised its discretion in denying appellants' motion. *Swam* v. *United States,* 327 F. 2d 431, 433 (C.A. 7), certiorari denied, 379 U.S. 852.

CONCLUSION

For the reasons stated, the judgment of the court below should be affirmed.

Respectfully submitted.

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SUPREME COURT OF THE UNITED STATES

October Term, 1969.

NORTHERN FREIGHT LINES, INC., ET AL. *v.* UNITED STATES ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

No. 1160. Decided March 16, 1970

PER CURIAM:

The motions to affirm are granted and the judgment is affirmed.